89-635
No. 89-___

In The

Supreme Court of the United States

October Term, 1989

NATIONAL FEDERATION OF FEDERAL EMPLOYEES,

Petitioner,

v.

RICHARD B. CHENEY, SECRETARY OF DEFENSE, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

H. STEPHAN GORDON*
General Counsel

ALICE L. BODLEY
Deputy General Counsel

JEFFREY SUMBERG
Staff Attorney

NATIONAL FEDERATION OF
FEDERAL EMPLOYEES
1016 16th Street, N.W.
Washington, D.C. 20036
(202) 862-4400

Attorneys for Petitioners

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

Whether the Fourth Amendment prohibits the Department of the Army from requiring its civilian drug and alcohol counselors to submit to urinalysis testing to detect evidence of illegal drug use where such testing is conducted randomly without any reason to suspect that particular employees have used illegal drugs, and where the employees to be tested are not in positions directly affecting public safety or national security.

PARTIES TO THE PROCEEDINGS

The National Federation of Federal Employees was a plaintiff-appellee in the U.S. Court of Appeals for the District of Columbia Circuit and is the petitioner here. The following were plaintiffs-appellees in the circuit court but are not petitioners in this case: National Federation of Federal Employees Local 2058, Charles W. Jackson, American Federation of Government Employees, American Federation of Government Employees Local 1922, Thomas R. Daniels, Joseph Lane, James Johnson, American Federation of Government Employees Local 1546, Rosemarie Alyce Duff, Dewey Lee, Monseis M. Ramos, Ronald George Spooner, Daniel I. Straight. The defendants-appellants below were Secretary of Defense Richard B. Cheney (substituted for Frank C. Carlucci), then-Secretary of the Army John O. Marsh, Jr., Colonel Ronald P. Cypher, Captain Dennis Wild, and Colonel James W. McFarland, all of whom were named in their official capacities.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner National Federation of Federal Employees respectfully requests that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the circuit court is reprinted in the Appendix to this petition at pages 1-29. The decisions of the district court, *National Federation of Federal Employees v. Carlucci*, 680 F. Supp. 416 (D.D.C. 1988) (granting preliminary injunction), and *National Federation of Federal*

Employees v. Carlucci, 690 F. Supp. 46 (D.D.C. 1988) (granting permanent injunction), are reprinted in the Appendix at pages 35-50 and 51-98, respectively.

JURISDICTION

The decision of the United States Court of Appeals for the District of Columbia Circuit was entered on August 29, 1989. This Court has jurisdiction to review the judgment of the court below under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

This case also involves Executive Order No. 12,564, 51 Fed. Reg. 32,889 (Sept. 17, 1986), Department of Defense Directive 1010.9, Army Regulation 600-85, and portions of the "Mandatory Guidelines for Federal Workplace Drug Testing Programs," 53 Fed. Reg. 11,970 (April 11, 1988). All are reprinted in the Appendix to this petition.

STATEMENT OF THE CASE

I. The Army's Random Drug Testing Program

On April 8, 1985, the Department of Defense issued Directive 1010.9 ("DOD Directive"), which authorized DOD's component agencies to begin random drug testing of civilian employees in "critical" positions. App. 99.[1] The Department of the Army implemented the DOD Directive in 1986 by issuing Army Regulation 600-85, Interim Change III ("AR 600-85"). App. 107. While the Army has designated four general categories of "critical" employees for random drug testing, only one is presented here for review: the civilian treatment staff of the Army's Alcohol and Drug Abuse Prevention and Control Program ("ADAPCP").[2] These employees are responsible for counseling civilian and military personnel who seek help for alcohol or drug abuse problems. Although substance abuse counselors do not fall within the definition of "critical jobs" set forth in the DOD Directive,[3] drug

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[1] The Directive also provides for testing of applicants, testing as part of an accident investigation, and testing upon probable cause to believe that an employee is impaired by drugs while on duty. App. 102. Only the random aspect of the Army's testing program is at issue in this case.

[2] The Army program also requires random testing of aviation employees, civilian guards and police, employees holding "nuclear and chemical surety positions" in the Personnel Reliability Program (PRP), and employees at the Army's drug testing laboratories.

[3] The Directive defines "critical jobs" as those involving law enforcement, national security or the internal security of the Department of Defense, or the protection of property or persons from harm. App. 101-102.

testing was justified by the Army on the grounds that civilian treatment staff having direct contact with ADAPCP clients "must be certifiably drug free" if the program is to "function properly in assisting with identification and treatment of other military and civilian personnel. . . ."[4]

The Army's drug testing program is conducted in accordance with the "Mandatory Guidelines for Federal Workplace Drug Testing Programs" issued by the Department of Health and Human Services on April 11, 1988, 53 Fed. Reg. 11,970 (1988). App. 132.[5] The Guidelines set out the procedures that govern the collection of urine specimens for laboratory analysis. On the day an employee is ordered to undergo a drug test, he or she will be directed to report to a "collection site" and will be met there by an agent of the government referred to as a "collection site person." Upon arrival at the site, the employee is required to provide identification and surrender any "unnecessary outer garments" and personal belongings. App. 134.

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[4] Department of Army Request for Designation of Jobs/Classes of Jobs as "Critical," App. 118.

[5] The HHS Guidelines were issued pursuant to Executive Order 12,564, 51 Fed. Reg. 32,889 (Sept. 17, 1986), App. 120, which directed the heads of all Executive agencies to institute drug testing of federal government employees in "sensitive" positions. Section 4(d) of the Order gave authority to the Secretary of Health and Human Services to issue scientific and technical

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The employee must wash his or her hands before urinating, and the collection site monitor must accompany the employee into the restroom where the specimen is collected and must remain there throughout the collection process. App. 135. Although an employee may provide a urine specimen in a stall or behind a partition, the collection site monitor must remain close by in order to detect "any unusual behavior or appearance." App. 134. If the collection site monitor has "reason to believe" that an employee may tamper with the sample, the employee will be ordered to provide another specimen under the direct gaze of the monitor. App. 137.

After the employee relinquishes the urine specimen, the collection site monitor must confirm that a sufficient amount of urine is in the container. App. 135-36. If the amount is insufficient, the employee will be required to drink additional liquid and urinate again. The monitor must measure the temperature of all urine samples and inspect them for signs of contaminants. App. 136. If the temperature of a specimen falls outside an established range, the employee must provide another sample, this time under the direct observation of the monitor. App. 136.

(Continued from previous page)

guidelines for federal agency drug testing programs. Although the Army drug testing program pre-dates the Executive Order, Congress has since mandated that all federal agencies conduct their programs in accordance with the HHS Guidelines. *See* Supplemental Appropriations Act of 1987, Pub. L. No. 100-71, § 503, 101 Stat. 391, 468-71 (codified at 5 U.S.C. § 7301 note (Supp. V 1987)).

The urine sample is then sent to a laboratory where it is subjected to an initial immunoassay test. If the results are positive, a confirmatory test is done using the more sensitive gas chromatography/mass spectrometry test. App. 139-40.

An employee whose urinalysis has been confirmed as positive "will be either reassigned or demoted to a non-critical job; or, if there is no job available for which the employee is qualified, separated from the service." App. 111. An employee may be referred to a rehabilitation program, but the Army nevertheless retains the right to take disciplinary action after a positive test result. App. 114.

II. The Proceedings Below

This case has its origins in three separate actions filed in three different district courts.

In the first case, the National Federation of Federal Employees ("NFFE") filed suit in the U.S. District Court for the District of Columbia on March 13, 1986, alleging that the Army's random drug testing program violated the constitutional and statutory rights of its union members. Federal jurisdiction rested on 28 U.S.C. §§ 1331 and 2201. The district court dismissed the complaint on jurisdictional grounds, *NFFE v. Weinberger*, 640 F. Supp. 642 (D.D.C. 1986), but the U.S. Court of Appeals for the D.C. Circuit reversed and remanded for findings of fact and a decision on the merits of NFFE's Fourth Amendment claims. *NFFE v. Weinberger*, 818 F.2d 935 (D.C. Cir. 1987).

The second case was filed on July 31, 1986 by the American Federation of Government Employees ("AFGE") in the U.S. District Court for the Southern District of Georgia. The district court issued a preliminary injunction limited to the civilian police officers at Fort Stewart, whose local union had brought the suit. *American Federation of Government Employees v. Weinberger,* 651 F. Supp. 726 (S.D. Ga. 1986). Following the D.C. Circuit's remand in *NFFE v. Weinberger,* the Georgia district court transferred the Fort Stewart case to the U.S. District Court for the District of Columbia.

The third case was filed on May 29, 1988, as *AFGE v. Weinberger* in the Eastern District of California. The court declined to rule on the application for a preliminary injunction, and instead transferred the case to the district court for the District of Columbia.

The three cases were consolidated in the District of Columbia and heard on plaintiffs' motion for a preliminary injunction and the government's motion for summary judgment. Ruling only on plaintiffs' Fourth Amendment claims, the district court found the Army's random drug testing program unconstitutional and issued a preliminary injunction. *NFFE v. Carlucci,* 680 F. Supp. 416 (D.D.C. 1988), App. 51. The court held that the government's interest in maintaining public respect and confidence – its integrity interest – was "not sufficiently compelling" to justify random drug testing of the Army's drug and alcohol treatment staff:

> Under this rationale all Cabinet officers and the President should undergo random drug testing. The Court finds this interest less compelling than safety and security. The government has

> presented only supposition but no evidence of any harm that would occur if the personnel were not "certifiably drug free."

680 F. Supp. at 433, App. 91.

Moreover, the court found that the Army's testing program was simply "not rooted in the discovery of any particular drug problem among its civilian employees or any group of those employees." *Id.* at 420, App. 58.

A stay of the preliminary injunction pending appeal was issued by the D.C. Circuit on March 30, 1988. App. 31. Following additional discovery, the district court entered a permanent injunction on July 6, 1988. *NFFE v. Carlucci*, 690 F. Supp. 46 (D.D.C. 1988), App. 35. In light of the stay granted earlier by the circuit court, the district court stayed the permanent injunction of the Army testing program pending appeal. The government's motion to consolidate the appeals from the preliminary and permanent injunctions was granted by the panel below on August 11, 1988. App. 33, and oral arguments were heard on October 18, 1988.

Pursuant to an order of the panel issued April 10, 1989, App. 30, the parties filed supplemental briefs addressing the impact of this Court's recent decisions in *Skinner v. Railway Labor Executives' Association*, 489 U.S. ___, 109 S. Ct. 1402 (1989), and *National Treasury Employees Union v. Von Raab*, 489 U.S. ___, 109 S. Ct. 1384 (1989). On August 29, 1989, the panel issued its decision upholding random testing of drug and alcohol counselors.[6] The

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[6] In addition, the court upheld random testing for civilian law enforcement personnel and employees in aviation positions, App. 16-18, 21-24, but refused to allow testing for

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panel found that successful performance of a counselor's duties depends on abstinence from illegal drug use, as such use suggests a lack of allegiance to the essential mission of the ADAPCP and would frustrate the treatment and rehabilitation objectives of the counseling program. *See* App. 26-27.

REASONS FOR GRANTING THE WRIT

This case presents substantial and unresolved constitutional issues that should be determined by this Court. In *Skinner v. Railway Labor Executives' Association*, 489 U.S. ___, 109 S. Ct. 1402 (1989) and *National Treasury Employees Union v. Von Raab*, 489 U.S. ___, 109 S. Ct. 1384 (1989), the Court reviewed for the first time some of the difficult issues surrounding mandatory drug testing in the workplace. While these decisions began to define the constitutional parameters of public sector employee drug testing, the unique characteristics of the testing programs under review and the narrow focus of the Court's rulings left unanswered the novel and more far-reaching issue presented here: the constitutionality of a *random* drug testing program for employees who pose no direct or immediate threat to public safety or national security. This unsettled constitutional issue – in our view, decided incorrectly by the panel below – has repercussions that extend well

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employees at the Army's drug testing laboratories. App. 27-28. The court also declined on the record before it to uphold random testing of employees in chemical and nuclear surety positions, but instead remanded this portion of the case to the district court to determine which employees actually have access to chemical or nuclear materials. App. 19-21.

beyond even the important circumstances of this case and merits plenary review by the Court.

Random drug testing is the centerpiece of the vast majority of public sector drug testing schemes, including the program at issue here. In the federal workforce alone, some 345,000 employees face random drug testing pursuant to Executive Order 12,564.[7] Widespread random testing is by no means the exclusive province of the federal government, however, as thousands of public employees at all levels of state and local government are required, like their federal counterparts, to provide urine specimens for inspection and analysis by their employers.

While this Court constructed a general analytical framework in *Skinner* and *Von Raab* for determining the constitutionality of government-mandated drug testing, in neither case was the Court called upon to review a random testing program. *Skinner* involved the Federal Railroad Administration's program requiring blood, breath, and urine tests of train crews following a rail accident or a serious violation of safety rules. *Von Raab* involved the Customs Service drug testing program, which required applicants for certain positions within the Service to undergo a one-time test, with advance notice of the test date, as a condition of final placement. In marked

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[7] The Administration informed Congress on May 3, 1988 that federal agencies had designated 345,528 employees for random drug testing pursuant to the Executive Order. Every agency testing plan certified to Congress includes random testing provisions. *See* Havemann, *U.S. Details Plans for Drug Tests*, Washington Post, May 4, 1988, at A1.

contrast to these limited testing regimens, the Army program subjects employees to compulsory urinalysis testing on a recurring and surprise basis, producing an invasion of privacy far more intrusive than either post-accident or applicant testing, and raising an important constitutional issue on which this Court has not ruled.

The court below found no dispositive distinctions between random testing and the testing schemes considered by this Court in *Skinner* and *Von Raab*. Relying on its recent decision in *Harmon v. Thornburgh*, No. 88-5265 (D.C. Cir. June 30, 1989), the panel held that " 'the random nature of the [subject] testing plan is a *relevant* consideration' but does not 'require[] us to undertake a fundamentally different analysis from that pursued by the Supreme Court.' " App. 13. (quoting *Harmon v. Thornburgh*, slip. op. at 10) (emphasis in original).

This was constitutional error. The panel below failed to heed this Court's clear admonition that searches based on less than individualized suspicion would be tolerated only in "limited circumstances, where the privacy interests . . . are minimal. . . ." *Skinner*, 109 S. Ct. at 1417. Such limited circumstances are notably absent here. The invasion of privacy so obviously engendered by random testing is far more than "minimal", and certainly greater here than in *Skinner*, where testing was triggered by a major train accident – an obvious emergency which by itself reduces employee expectations of privacy – or in *Von Raab*, where testing was triggered by the voluntary act of an employee seeking promotion.

In fact, this Court has already indicated the heightened scrutiny it will give to surprise random invasions of

privacy. In *Delaware v. Prouse*, 440 U.S. 648 (1979), the Court distinguished between random automobile stops on the highway, which it found unconstitutional in *United States v. Brigoni-Ponce*, 422 U.S. 873, 883 (1975), and routine stops at known highway checkpoints, which it upheld in *United States v. Martinez-Fuerte*, 428 U.S. 543, 559 (1976). In *Von Raab*, the Court again recognized the "crucial distinction" (*Delaware v. Prouse*, 440 U.S. at 657) between announced and surprise searches. The Court analogized the advance-notice promotion-based testing at the Customs Service to routine highway stops where motorists " 'are not taken by surprise as they know, or may obtain knowledge of, the location of the checkpoints and will not be stopped elsewhere.' " *Von Raab*, 109 S. Ct. at 1394 n.2 (quoting *Martinez-Fuerte*, 428 U.S. at 559).

The same "crucial distinction" exists here. Like random automobile stops, random drug testing – which singles out particular individuals for searching scrutiny – naturally "generat[es] concern or even fright" on the part of employees who do not know when the government's threatened invasion of privacy will come. *See Delaware v. Prouse*, 440 U.S. at 657. Such a profound "psychological intrusion," *id.*, – which is inherent in any random testing program – is of independent constitutional importance and poses a Fourth Amendment issue which has not been decided by this Court.

In approving mandatory random drug testing of alcohol and drug counselors, the court below looked to this Court's decision in *Von Raab* for support. Reasoning that drug counselors who use drugs may be " 'unsympathetic to their mission,' " App. 26, (quoting *Von Raab*,

109 S. Ct. at 1393), the court found drug testing a permissible means of ensuring that drug counselors are "allegiant" to the goals of the Army's rehabilitation program. App. 26. As a corollary, the court held that drug use among substance abuse counselors is so "dissonant" with their responsibilities that they should "reasonably expect to provide extraordinary assurances of trustworthiness and probity." *Id.*

The ease with which the panel glossed over critical distinctions between front-line drug interdiction personnel and the Army's civilian treatment staff betrays a fundamental misunderstanding of *Von Raab*. A fair reading of *Von Raab* teaches that only a truly "compelling" interest of the government can support a urinalysis testing program that dispenses with the constitutional safeguard of particularized suspicion. *See Von Raab*, 109 S. Ct. at 1394. *Von Raab* turned on evidence of the "extraordinary safety and national security hazards" that were raised by the possibility of drug use among Customs agents with drug interdiction responsibilities. *Von Raab*, 109 S. Ct. at 1395. The Court observed that the Customs Service is "our Nation's first line of defense against one of the greatest problems facing the health and welfare of our population," *id.* at 1392, and concluded that the government's interest in testing certain "front-line [drug] interdiction personnel" was vital to the "national interest in self protection." *Id.* at 1393. In addition, the Court was confronted in *Von Raab* with especially harrowing evidence of the temptations and dangers that Customs agents face every day from drug traffickers who "do not hesitate to use violence to protect their lucrative trade and avoid apprehension." *Id.* at 1392.

On these facts, a close majority of the Court found a "compelling interest in ensuring that front-line interdiction personnel are physically fit and have unimpeachable integrity and judgment." *Id.* at 1393.

The panel below has failed to identify any comparably compelling governmental interests that could support testing the employees here on less than individualized suspicion of drug use. Without diminishing the importance of their responsibilities, the work of the Army's civilian drug treatment staff simply does not implicate the same "extraordinary" safety and national security concerns that formed the foundation for this Court's decision in *Von Raab*. For this reason, the rationales for drug testing identified by the panel are broader and far more elusive than any this Court has yet considered. Indeed, the government's professed need to ensure the credibility and commitment of drug and alcohol counselors is not readily capable of limitation, and could just as easily be applied to physicians, nurses, psychologists, social workers, teachers, guidance counselors, and others who are regularly called on to instruct against the misuse of drugs and alcohol.[8] Disposition of this case would thus offer much needed guidance to the lower courts on the precise constitutional implications of a random urinalysis testing program for which the government can offer no tangible safety or security interests.

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[8] In fact, several thousand federal employees holding such positions are subject to random drug testing under the Executive Order. *See, e.g.*, "Department of Interior Drug-Free Workplace Plan" (Teachers, Education Specialists, and Guidance

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While the Court has not reached the particular questions framed by this case, the abundance of drug testing cases in the lower courts bear witness to the importance of the issues presented here.[9] The uncertainty left in the wake of the Court's narrow holdings in *Skinner* and *Von Raab* not only invites additional litigation, but may result in a patchwork of conflicting decisions in which random testing of government employees goes forward in some agencies, while testing of employees in similar positions is blocked elsewhere. Given the nature of the testing at issue here and the particular employment context in which that testing will be accomplished, this case presents the Court with an appropriate vehicle for resolving unsettled issues of profound concern to hundreds of thousands of public employees across the nation.

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Counselors: 3000 positions; Education Aids: 500 positions; Social Workers: 253 positions). "Department of Health and Human Services Drug-Free Workplace Plan" (Nurses: 2869 positions; Medical Officers: 1925 positions; Practical Nurses: 448 positions; Physician Assistants: 100 positions; Psychologists: 47 positions; Social Workers: 20 positions). Both of these drug testing plans have been challenged on constitutional grounds, and the cases are currently pending in the federal courts. *See Bangert v. Hodel*, 705 F. Supp. 643 (D.D.C. 1989) (preliminary injunction granted); *American Federation of Government Employees v. Bowen*, No. 88-3594 (D.D.C.) (complaint filed Dec. 16, 1988).

[9] *See, e.g., National Federation of Federal Employees v. Cheney*, No. 89-1727 (D.D.C.) (Defense Mapping Agency; motion for preliminary injunction filed June 21, 1989); *American Federation of Government Employees v. Cavazos*, No. 89-0775 (D.D.C. July 26,

(Continued on following page)

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

H. STEPHAN GORDON*
General Counsel

ALICE L. BODLEY
Deputy General Counsel

JEFFREY SUMBERG
Staff Attorney

NATIONAL FEDERATION OF
FEDERAL EMPLOYEES
1016 16th Street, N.W.
Washington, D.C. 20036
(202) 862-4400

Attorneys for Petitioners

* Counsel of Record

October 1989

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1989) (Department of Education; permanent injunction and summary judgment granted in part and denied in part); *National Treasury Employees Union v. Watkins*, No. 89-1006 (D.D.C. June 16, 1989) (Department of Energy; preliminary injunction granted in part and denied in part); *Hartness v. Bush*, 712 F. Supp. 986 (D.D.C. 1989) (Executive Office of the President; preliminary injunction granted). According to one recent estimate, there are more than 40 lawsuits pending against federal agency drug testing programs. *See* Havemann, *Rulings Force Agencies to Reevaluate Test Policies*, Washington Post, March 22, 1989, at A14.

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

APPENDIX

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APPENDIX A
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA COURT
Argued October 18, 1988 Decided August 29, 1989

No. 88-5080

NATIONAL FEDERATION OF FEDERAL EMPLOYEES, et al.

v.

RICHARD B. CHENEY, SECRETARY OF DEFENSE, et al., APPELLANTS

No. 88-5081

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, et al.

v.

RICHARD B. CHENEY, SECRETARY OF DEFENSE, et al., APPELLANTS

No. 88-5082

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, et al.

v.

RICHARD B. CHENEY, SECRETARY OF DEFENSE, et al., APPELLANTS

No. 88-5244

NATIONAL FEDERATION OF FEDERAL EMPLOYEES, et al.

v.

RICHARD B. CHENEY, SECRETARY OF DEFENSE, et al., APPELLANTS

No. 88-5245

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, et al.

v.

RICHARD B. CHENEY, SECRETARY OF DEFENSE, et al., APPELLANTS

No. 88-5246

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, et al.

v.

RICHARD B. CHENEY, SECRETARY OF DEFENSE, et al., APPELLANTS

Appeals from the United States District Court
for the District of Columbia

(Civil Action No. 86-00681
Civil Action No. 87-01797
Civil Action No. 87-02350
Civil Action No. 86-00681
Civil Action No. 87-01797
Civil Action No. 87-02350)

John R. Bolton, Assistant Attorney General, Department of Justice, with whom *Jay B. Stephens*, United States Attorney, *Leonard Schaitman*, and *Robert V. Zener*, Attorneys, Department of Justice, were on the brief, for appellants.

Joe Goldberg, with whom *Mark D. Roth* was on the brief, for appellees, American Federation of Government Employees, et al.

H. Stephan Gordon and *Jeffrey Sumberg* were on the brief, for appellees, National Federation of Federal Employees, *Bruce P. Heppin* and *Suzanne L. Kalfus* also entered appearances for National Federation of Federal Employees.

Before WALD, *Chief Judge*; MIKVA and SENTELLE, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* SENTELLE.

SENTELLE, *Circuit Judge*: In this appeal we are called upon to assess the constitutionality of the United States

Department of the Army's practice of subjecting certain of its civilian employees to compulsory, random toxicological urine testing. Implemented in 1986, the testing program requires more than 9,000 of the Army's 450,000 civilian employees be tested in any of four circumstances, including "[pe]riodically . . . on the basis of random criteria." Appellees, National Federation of Federal Employees and American Federation of Government Employees – union representatives of the covered employees – filed actions to enjoin the random aspect of the program. The District Court concluded that suspicionless urinalysis testing constituted an unreasonable search in violation of the Fourth Amendment, and accordingly entered a nationwide preliminary injunction against such testing. *National Fed'n of Fed. Employees v. Carlucci*, 680 F. Supp. 416 (D.D.C. 1988).[1] After this Court ordered the preliminary injunction stayed pending appeal, *National Fed'n of Fed. Employees v. Carlucci*, No. 88-5080 (D.C. Cir. Mar. 30, 1988), the District Court permanently enjoined the Army from implementing the random aspect of its testing program. *National Fed'n of Fed. Employees v. Carlucci*, No. 86-0681 (D.D.C. Jul. 6, 1988). The District Court stayed the permanent injunction pending resolution of this appeal. *Id.* mem. op. at 15. We affirm in part, vacate in part, and remand for further proceedings.

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[1] The District Court previously dismissed the cause on jurisdictional grounds. *National Fed'n of Fed. Employees v. Weinberger*, 640 F. Supp. 642 (D.D.C. 1986). We reversed and remanded. *National Fed'n of Fed. Employees v. Weinberger*, 818 F.2d 935 (D.C. Cir. 1987).

I.

A.

In 1971, Congress directed the Secretary of Defense to "prescribe and implement procedures . . . [to] identify, treat, and rehabilitate members of the Armed Forces who are drug or alcohol dependent persons." Pub. L. No. 92-129, tit. V, § 501(a), 85 Stat. 348, 361 (1971). Pursuant to this command, the Army initiated mandatory toxicological testing of its military forces, a program that by 1982 resulted in comprehensive military testing. *See* Joint Appendix ("J.A.") at 237. On April 8, 1985, the Department of Defense issued Directive 1010.9, authorizing urinalysis testing of civilians occupying or applying for "critical jobs,"[2] and requiring each "DoD component" to submit proposals for critical job designations. The Directive provided that covered civilians "may be required to participate in urinalysis testing" in four circumstances: (1) before appointment or selection; (2) "[p]eriodically . . . on the basis of neutral criteria;" (3) upon probable cause to believe on-duty drug impairment; and (4) as part of a "mishap or safety investigation." Directive 1010.9 para. F.2.a. (1)-(4).

In order to implement the Directive, in 1986 the Army promulgated Army Regulation 600-85, Interim Change I11 ("AR 600-85"). AR 600-85 provides for testing

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[2] The Directive defined "critical jobs" as "[t]hose jobs or classes of jobs sufficiently critical to the DoD mission or protection of public safety that screening to detect the presence of drugs is warranted as a job-related requirement." Directive 1010.9 para. C.3.

under the same four circumstance listed in the Department's Directive.[3] Testing was authorized for any of fourteen classes of critical jobs, categorized as follows: aviation, guard and police, "personnel reliability program," and the Alcohol and Drug Abuse Prevention and Control Program. *Id.* Table 5-1.[4] A brief description of classes of critical jobs accompanied the Regulation.

After Directive 1010.9 and Army Regulation 600-85 were issued, the Department of Health and Human Services, in accordance with Executive Order 12,564, "Drug-Free Federal Workplace," 3 C.F.R. § 224 (1987), promulgated regulations to govern federal drug testing. *See* "Mandatory Guidelines for Federal Workplace Drug Testing Programs," 53 Fed. Reg. 11,970 (April 11, 1988) ("HHS Regulations" or HHS Reg."). Congress ordered the Army to comply with the HHS Regulations. *See* Supplemental Appropriation Act of 1987, PUB. L. No. 100-71, § 503, 101 Stat. 391, 468-71 (codified at 5 U.S.C. § 7301 note (Supp. V 1987)). The parties agree that the constitutionality of the

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[3] The provision for random testing is altered in the Regulation from the Directive's "[p]eriodically . . . on the basis of neutral criteria" to "[p]eriodically . . . on a random basis." *Compare* Directive 1010.9 para. F.2.a.(2) *with* AR 600-85 para.5-14*e*(1)(b).

[4] Table 5.1 lists the following specific job categories subject to testing: air traffic controller, pilot, aircraft engine mechanic, aircraft overhaul specialist, propeller and motor mechanic, aircraft mechanic, aircraft servicer, guard, police, criminal investigator, correctional officer, chemical and nuclear surety positions, direct service staff, and all employees at Army forensic drug testing laboratories. AR 600-85, Table 5-1.

Army's testing program is to be judged with reference to the procedures as they currently exist, rather than as originally announced. *See* Brief for Appellants at 6 n.1; Brief for Appellees at 8 & n.3; *See generally California Bankers Ass'n v. Shultz*, 416 U.S. 21, 53 (1974).

The HHS Regulations provide that, upon arriving at an assigned time and collection site, the subject employee is to prepare for the test by removing unnecessary outer garments and washing his hands. Thereafter the subject employee it to "remain in the presence of the collection site person." HHS Reg. § 2.2(f)(6), 53 Fed. Reg. at 11,980. The sample is to be provided "in the privacy of a stall or otherwise partitioned area," *id.* § 2.2(f)(7), 53 Fed. Reg. at 11,981, "unless there is reason to believe that a particular individual may alter or substitute the specimen to be provided," *id.* § 2.2(e), 53 Fed. Reg. at 11,980.

The sample is then sent to an HHS-approved laboratory, under procedures ensuring a secure chain of custody, *id.* § 2.2(f)(17)-(26), 53 Fed. Reg. at 11,981, where it is tested for proscribed drugs.[5] The sample is initially subject to a radioimmunoassay (RIA) test, and if the results of that test exceed certain cut-off levels, to a gas chromatography/mass spectrometry (GC/MS) test. *See* J.A. at

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[5] With marijuana and cocaine, the test reveal the presence of the inactive product resulting from the body's breakdown of the drugs' metabolites, benzoylecgonine in the case of cocaine, and Delta-9-tetrahydrocannabinol-9-carboxylyic acid, with marijuana. The tests detect the actual presence of phencyclidine (PCP), opiates, the amphetamines, each of which is excreted directly into the urine. HHS Reg. §§ 2.4(e)-(f), 53 Fed. Reg. at 11,983.

242. A sample is considered positive only if it is positive on both tests. HHS Reg. § 2.4(g)(2), 53 Fed. Reg. at 11,983.

Any applicant who tests positive for proscribed drugs "will be denied further consideration" for employment, AR 600-85 para. 5-14*c*(3)(a), and employees who test positive "may be subject to adverse action," identified as reassignment or demotion to a noncritical job, or "if there is no job available for which the employee is qualified, separat[ion] from the service." *Id.* para. 5-14*c*(1)(b). Among the potential penalties for refusing to submit to a test or attempting to adulterate the test sample is "[r]emov[al] from Federal service." *Id.* para. 5-14*c*(4)(b) & *c*(5). The Regulation provides that any employee testing positive "shall, if eligible," be offered counseling or treatment. *Id.* para. 5-14*e*(4). Collateral use of the test results is proscribed by regulation and statute alike. *See* HHS Reg. § 2.8, 53 Fed. Reg. at 11,986; § 503(e), PUB. L. No. 100-71, 101 Stat. 471; *cf.* AR 600-85 para. 5-14*e*(5).

B.

Appellees filed actions challenging the legality of the random aspect of the Army testing program.[6] The Army

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[6] The three actions consolidated below were filed in three different district courts. In the first, the District Court for the Southern District of Georgia enjoined civilian testing at the Fort Stewart/Hunter Army Airfield in Georgia, *American Fed'n of Gov't Employees v. Weinberger*, 651 F. Supp. 726 (S.D. Ga. 1986). The district court then, *sua sponte*, ordered the cause transferred to the District Court for the District of Columbia. In

(Continued on following page)

argued that compulsory testing was justified by compelling governmental interests in the safety, security, and integrity of its workforce. The District Court, relying on our since vacated decision in *Jones v. McKenzie*, 833 F.2d 335, 340-41 (D.C. Cir. 1987), *vacated sub nom. Jenkins v. Jones*, 109 S. Ct. 1633 (1989), *replaced*, No. 86-5198 (D.C. Cir. June 27, 1989), ruled only on appellees' Fourth Amendment challenge, concluding that mandatory, random urinalysis testing constituted an unreasonable search in violation of the Fourth Amendment. Although it conceded the Army's "compelling safety interest . . . in maintaining a drug-free work*place*," the Court reasoned that because the Army failed to show that drug testing measures on-the-job impairment, "urinalysis drug testing lacks the necessary nexus to the employer's safety concern to satisfy the Fourth Amendment." *Carlucci*, 680 F. Supp. at 418 (emphasis in original). The District Court dismissed the Army's nonsafety interests as insufficiently compelling to warrant "the substantial intrusion of mandatory, random urinalysis." *Id.* Accordingly, the Court enjoined such testing "unless the test is based upon a reasonable, articulable, and individualized suspicion that a specific employee is under the influence of drugs or alcohol while on duty." *Id.* at 436. On July 6, 1988, the

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the second, *American Fed'n of Gov't Employees v. Weinberger*, the Eastern District of California declined to rule on plaintiffs' application for a nationwide preliminary injuction, instead granting defendants' motion to transfer. The District Court below, the site of the National Federation of Federal Employees' action, consolidated the cases. For a detailed discussion of the various district court proceedings, *see Carlucci*, 680 F. Supp. at 418-20.

District Court made final its injunction against such testing.

II.

A.

In decisions issued during the pendency of this appeal, the Supreme Court rejected Fourth Amendment challenges to two federally mandated drug testing programs. In the first, *National Treasury Employees Union v. Von Raab*, 109 S. Ct. 1384 (1989), the Court sustained as reasonable a United States Customs Service testing program that required pre-ascension testing of employees seeking positions directly involving the interdiction of illegal drugs or that require the incumbent to carry a firearm. *Id.* at 1394, 1397. The Court held that, on balance, the "Government's compelling interests in safety and in the integrity of our borders" outweighed the privacy interests of these promotion-slated Customs agents, and thus warrantless, suspicionless testing, while a search, was not unreasonable. *Id.* at 1397. The Court did not pass on the constitutionality of the third category of subject employees – those whose new duties would require that they "handle classified material" – because the record did not reflect adequately whether the covered employees were "likely to gain access to sensitive information." Absent such a showing, the Court was unable to discern "whether the Service has defined this category of employees more broadly than necessary to meet the purposes of the Commissioner's directive." *Id.* at 1397. The Court therefore remanded the case to the Court of Appeals, so that it might "clarify the scope of this category of employees subject to testing." *Id.*

In *Skinner v. Railway Labor Executives' Association*, 109 S. Ct. 1402 (1989), the Court sustained against Fourth Amendment challenge regulations promulgated by the Federal Railroad Administration ("FRA") authorizing certain carriers to conduct suspicionless toxicological tests. The regulations mandate blood and urine tests be administered to covered employees following major train accidents or incidents, and authorize, but do not require, railroads to administer breath and urine tests, or both, to employees who violate certain safety rules. *See* 49 C.F.R. § 219.201(a)(1)-3; *id.* § 219.301(b)(2)-(3). A variety of factors established the reasonableness of the program, among them, (1) the "limited" intrusions occasioned by the testing procedures, *id.* at 1417; (2) the diminished expectation of privacy that attaches to employment in an "industry that is regulated pervasively to ensure safety," *id.* 1418; and (3) the government's "compelling" or "surpassing" interest in railway safety, *id.* at 1419, 1422, an interest that could not adequately be protected by testing only upon individualized suspicion, *id.* at 1420-21.

Von Raab and *Skinner* make clear, consistent with our own precedent, *see National Fed'n of Fed. Employees v. Weinberger*, 818 F.2d 935, 942 (D.C. Cir. 1987), that the Fourth Amendment is applicable to governmentally compelled urinalysis. *See Skinner*, 109 S. Ct. at 1412-13; *Von Raab*, 109 S. Ct. at 1390. The cases also establish that testing, if justified by needs beyond the normal need for law enforcement, need not necessarily be supported by a warrant, probable cause, or any level of particularized suspicion. In this case, like *Von Raab* and *Skinner*, the government's interests in testing are clearly other than

the ordinary need for law enforcement. The testing program authorized by Directive 1010.9 has three stated purposes: (1) assisting in determining employee fitness, (2) identifying and treating drug abusers, and (3) maintaining national security and the internal security of the Defense Department. Directive 1010.9 para. D.1-3. *See also* AR 600-85 para. 5-14*a*(1)-(3). Law enforcement appears nowhere among the program's stated goals, and for that matter, non-consensual disclosure of test results to police authorities is proscribed both by regulation and statute. *See* HHS Reg. § 2.8, 53 Fed. Reg. at 11,986; § 503(e), Pub. L. No. 100-71, 101 Stat. 471.

Even where a testing regime is motivated by needs other than law enforcement, the question remains whether the governmental interests asserted are so substantial as to justify the suspicionless privacy intrusions at issue. In *Von Raab* and *Skinner* the Supreme Court laid out a balancing test that, while not self-executing, focuses our attention on a single question: Does the government's need to conduct the suspicionless searches outweigh the privacy interests of the covered employees in such a fashion that it is "impractical to require a warrant or some level of individualized suspicion?" If so, the Army's testing scheme cannot be deemed unreasonable. *See Von Raab*, 109 S. Ct. at 1390, 1392. *Accord Skinner*, 109 S.Ct. at 1414.

B.

Initially, appellees ask that we find *Von Raab* and *Skinner* of "little or no impact" on the present case, since the Army tests on a random, rather than post-accident or pre-ascension basis. Supplemental Brief for Appellees,

American Federation of Government Employees at 2.[7] To settle this contention, we need look no further than our recent decision in *Harmon v. Thornburgh*, No. 88-5265 (D.C. Cir. June 30, 1989), where, while recognizing that a random plan might plausibly be considered different in kind from the programs approved by the Supreme Court, we concluded that "the random nature of the [subject] testing plan is a *relevant* consideration," but does not "require[] us to undertake a fundamentally different analysis from that pursued by the Supreme Court." Slip op. at 10 (emphasis in original).

Throughout this litigation appellees have argued that testing is unreasonable because the Army has no interest in off-duty conduct that does not have some effect on on-duty performance. "At best," appellees correctly observe, "a positive result indicates only that at some time in the past, maybe days or weeks before the test, the tested employee ingested a drug in some unknown quantity." Brief for Appellees at 36 (footnote omitted). The District Court, relying on the Ninth Circuit's opinion in *Railway Labor Executives' Association v. Burnley*, 839 F.2d 575, 588 (9th Cir. 1988), *reversed sub nom. Skinner*, 109 S.Ct. 1402,

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[7] Appellee American Federation of Government Employees also argues that we should disregard *Skinner* and *Von Raab* because they "ignored" prior Supreme Court precedent in favor of "a free-form 'analysis' based upon 'reasonableness.' " Supplemental Brief for Appellees, American Federation of Government Employees at 9. *See also id.* at 8 ("[n]either RLEA nor NTEU provides a workable Fourth Amendment analysis"). Such a contention, evidencing nothing more than dissatisfaction with the authority we are duty-bound to apply faithfully, avails appellees nothing.

concluded that the inability of testing to differentiate between drug use that produces on-the-job impairment and that which does not was fatal to the program's constitutionality. *Carlucci*, 680 F. Supp. at 434.

As a means of uncovering the information in which the Army has a legitimate interest, we agree that urine testing – unaided by blood or breath testing – is a blunt instrument. A single positive urine test result is silent as to when or how much of the drug was taken, the pattern of the employee's drug use, or whether the employee was intoxicated when the test was given. *See* J.A. 90-91, 102-04. While the question may have been a close one before the Supreme Court's recent pronouncements, particularly in view of our original opinion in *Jones, see Jones v. McKenzie*, 833 F.2d at 340-41, *Von Raab and Skinner* convince us that the District Court, like the Ninth Circuit in *Skinner*, adopted as overly restrictive view of the Fourth Amendment's command of reasonableness.

In *Skinner*, the Ninth Circuit, like the District Court in the present case, concluded that drug testing was constitutionally infirm because of its inability to differentiate drug use that results in on-duty impairment from that which does not. *Burnley*, 839 F.2d at 588. The Supreme Court concluded that this aspect of the Ninth Circuit's decision was flawed on several fronts. First, the analysis overlooked the principle that evidence " 'need not conclusively prove the ultimate fact in issue,' " so long as it makes a fact of consequence more or less probable. *Skinner*, 109 S.Ct. at 1421 (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 345 (1985)). Second, the *Skinner* Court noted that under the Federal Railroad Administration regulations, urinalysis test results serve only as "a secondary source

of information," as the regulations "plac[e] principal reliance on the results of blood tests, which unquestionably can identify *very recent* drug use." *Id.* Thus together, blood and urine tests provide a "highly effective means of ascertaining on-the-job impairment." *Id.* In the very same paragraph the Court noted a third flaw in the Ninth Circuit's analysis: It "failed to recognize that the FRA regulations are designed not only to discern impairment but also to deter it." *Id.*

Because *Skinner* can reasonably be read to depend for its conclusion on the co-administration of blood and urine tests, the Court's analysis in *Von Raab* – where the Customs Service administered only urine tests – is perhaps the more telling. In sustaining the Customs Service's practice of urine testing those whose new duties would require carrying a firearm, the Court identified the governmental interest as preventing on-the-job impairment – "the risk that employees who may suffer from impaired perception and judgment will be promoted to positions where they may need to employ deadly force." 109 S.Ct. at 1393. But the Court did not even advert to the inability of the testing procedures to differentiate on- and off-duty drug use or impairment. Rather, it referred only to the Service's broad responsibility to "ensur[e] against the creation of this dangerous risk," *id.*, a risk that urinalysis testing reasonably, albeit imperfectly, helped detect and prevent. The same analysis obtains in the present case. To hold as did the District Court – that only a procedure able to detect on-duty impairment is constitutionally permissible – would be tantamount to holding urinalysis testing

unreasonable *per se*[8] – a conclusion inconsistent with the Supreme Court's recent teachings.

III.

A.

It is readily apparent that the Army has a compelling safety interest in ensuring that the approximately 2,800 civilians who fly and service its airplanes and helicopters are not impaired by drugs. Employees in each of the covered positions – air traffic controllers, pilots, aviation mechanics and aircraft attendants – perform tasks that are fraught with extraordinary peril: A single drug related lapse by any covered employee could have irreversible and calamitous consequences.

The Supreme Court adverted to the government's compelling interest in maintaining air safety in *Von Raab*, quoting with apparent approval from *United States v. Edwards*, 498 F.2d 496 (2d Cir. 1974), which sustained the requirement that all passenger carry-on luggage be searched before it could be stored aboard commercial airliners. *See* 109 S.Ct. at 1395 n.3. In *Edwards*, Judge Friendly reasoned that " '[w]hen the risk is the jeopardy of hundreds of human lives and millions of dollars of

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[8] Indeed, the District Court appears to have recognized as much: "At this stage of the scientific development of drug testing, urinalysis testing does not advance [the Army's safety] interest because there is no convincing evidence that a positive result can *ipso facto* be equated to on-duty impairment." 680 F. Supp. at 433.

property . . . th[at] danger *alone* meets the test of reasonableness.' " *Id.* at 500 (citation omitted; emphasis in original). The *Von Raab* Court likewise concluded that where "the possible harm against which the Government seeks to guard is substantial, the need to prevent its occurrence furnishes an ample justification for reasonable searches calculated to advance the Government's goal." 109 S.Ct. at 1395 (footnote omitted). Compelling as the government's interest is in preventing the promotion of drug users to positions involving interdicting drugs and carrying firearms, it pales in comparison with the quintessential risk of destruction to life and property posed by aviation.

Without quarrelling with the profound significance of these interests, appellees contend that testing is nevertheless unreasonable because the risk posed by a drug-impaired aviation employee is abated by the Army's extensive system of safeguards and supervision already in place. Brief for Appellees at 6 n.2. This contention is a derivative of an argument appellees successfully pressed before the District Court: Drug testing is unreasonable because the Army's interests could be adequately achieved through the implementation of less intrusive alternatives such as supervisory observation and neurobehavioral testing. The District Court agreed, concluding that trained supervision and neurobehavioral testing would be both less intrusive and better able to detect those who are impaired at work because of drug use. *Carlucci*, 680 F. Supp. at 434.

While the Supreme Court has indicated that "the supervision to which the []employees are already subject" is a relevant factor in determining the reasonableness *vel*

non of testing, *Von Raab*, 109 S.Ct. at 1397, in *Skinner* the Court made clear that the reasonableness of a particular technique does not " 'necessarily or invariably turn' " on the existence of less intrusive alternatives. 109 S.Ct. at 1419 n.9 (quoting *Illinois v. Lafayette*, 462 U.S. 640, 647 (1983)). Like appellees, respondents in *Skinner* maintained that the government's interests could be adequately addressed by enforcing proscriptions already in force and by training supervisory personnel in drug impairment detection. The Court rejected this claim in part because "insistence on less drastic alternatives would require us to second-guess the reasonable conclusions drawn by the FRA after years of investigation and study." *Id.* The same analysis governs the present case.

Initially, it does not appear from the record that neurobehavioral testing – which counsel for appellees described as "a computerized manual dexterity test," Transcript of Proceedings ("Tr.") at 26 (Oct. 24, 1989) – is either less intrusive or less degrading than urinalysis testing. Nor does the record reveal that it would be feasible to subject aviators or their work-product to the kind of day-to-day scrutiny that would appear necessary in order for supervisory observation to be effective. *Cf. Von Raab*, 109 S.Ct. at 1395. Moreover, the employees who are subject to testing in this category "can cause great human loss before any signs of impairment become noticeable to supervisors or others." *See Skinner*, 109 S.Ct. at 1419. While the Army, unlike the Customs Service, has not expressly considered the various alternatives to drug screening, it is, in light of its experience from fifteen years of testing its military personnel, better able than we to assess the efficacy of urinalysis testing.

B.

The second category of tested civilians occupy "[c]hemical and nuclear surety positions" within the Personnel Reliability Program ("PRP"). AR 600-85, Table 5.1. This category includes nuclear reactor operators, nuclear weapons technicians, chemical ammunition maintenance specialists, quality assurance personnel, material handlers, laboratory workers, and "intrustion detection system maintenance personnel." J.A. at 204. Chemical and nuclear sureties are ostensibly "responsible for the custody, transportation, storage, maintenance, demilitarization, and security of surety materials." J.A. at 204.

We are, for reasons unrelated to the seriousness of the governmental interests invoked, unable to determine the reasonableness of this aspect of the testing program. On the current record it appears that among the employees tested as part of the PRP program are secretaries, engineering technicians, research biologists, and animal caretakers. *See* J.A. 533-65. It is not intuitive that a secretary would be "responsible for the custody, transportation, storage, maintenance, demilitarization, and security of surety materials." Nor is there any evidence in the record to assuage our doubt. Indeed, the only record material, an affidavit from a subject secretary, is to the effect that although she had been issued "protective equipment," she had not used it for anything but training. Nor does it appear that she has access to chemical or nuclear materials. *See* J.A. at 535-36.

We are likewise unable to discern the reasonableness of the inclusion of animal caretakers, of whom the record reveals nothing more than access to animals located in

secured areas. *See* J.A. at 560. Although we might be more inclined to deem reasonable the testing of engineering technicians and research chemists who are exposed to an unspecified "chemical agent," J.A. at 540, 550, or of research biologists, who have access to facilities located in secured areas maintained under the Chemical Surety Program, J.A. at 545, 555, we see little reason to resolve these questions of the category's coverage when the District Court may on remand develop a more complete factual record.

It may very well be, as the record appears to reflect, that all of these individuals are required to report all prescription drug use, to update background information, and to be regularly medically examined. *See* J.A. at 292. If such is the case, the employee's privacy expectations may be considerably diminished. *See supra* p. 10 & *infra* pp. 20-21. It may also be that these employees have as part of their assigned duties access to highly dangerous chemical and nuclear material and sensitive information, such that compelling safety and security interests would be advanced by toxicological testing. *Cf. Skinner*, 109 S. Ct. at 1419 (adverting to governmental interest in preventing drug use by those "who have routine access to dangerous nuclear power facilities") (citations omitted); *Harmon*, slip op. at 12 n.8 (permitting testing of those " 'whose assigned position duties include maintaining, storing or safeguarding a controlled substance' ") (citation omitted). The simple fact is that while the Army has averred serious interests to be furthered by testing PRP employees, we are not able to assess the reasonableness of the category as drawn. *Von Raab* counsels that in such

circumstances our responsibility is to remand. 109 S. Ct. at 1397.

C.

Appellants maintain that compelling safety and security interests justifying testing the approximately 3,700 civilians employed in positions pertaining to law enforcement, most notably civilian police and guards. *See* J.A. at 203-04. The threat to public safety posed by drug-impaired, gun-toting civilian officers is manifest; the most apparent risk arising from the fact that these personnel are armed, "many with automatic weapons," J.A. at 362, and may have access to other munitions. At the Anniston Army Depot in Georgia, for example, guards have access not only to the .38 caliber revolvers that they carry, but also to shotguns, semi-automatic and automatic rifles, machine guns, grenades, and grenade launchers. J.A. at 275.

Appellees contend that the risk to public safety posed by a drug-impaired Army guard is more theoretical than real, as "the work of an Army guard is far less dangerous and for more mundane than that of their counterparts on the outside, who may have to use their firearms at any moment." Supplemental Brief for Appellees at 6. Our reading of *Van Raab* convinces us that this contention while substantial, must fall. In *Von Raab*, the Supreme Court determined that the public interest "to prevent the promotion of drug users to positions that require the incumbent to carry a firearm" warranted preascension testing of such personnel. 109 S.Ct. at 1393. While it might be argued that we are not in fact presented

with " 'duties fraught with . . . risks of injury,' " *id*, the Court's opinion is silent on the likelihood that the threatened harm would occur. Nor is it obvious to us that Customs agents who are uninvolved with drug interdiction more frequently discharge their weapons than do the Army guards in question. It certainly appears that here, as in *Von Raab*, "the public should not bear the risk that employees who may suffer from impaired perception and judgment will be promoted to positions where they may need to employ deadly force." *Id*. The very fact that these employees' duties entail the possession of deadly weapons belies appellants' argument that there is no real danger of their using them.

Furthermore, a second, and perhaps more grievous threat is posed by a drug-impaired guard in the present case; stationed as he is in an extraordinarily hazardous setting. Several of the installations where the security personnel are stationed test the newest and most technologically advanced weapons systems. For example, the Aberdeen Proving Ground and White Sands Missile Range house nuclear reactors. J.A. at 250. The Anniston Depot stores more than 2 million small arms and munitions ranging from .22 caliber to 1,000 pound bombs, toxic chemical agents, and thousands of rockets. J.A. at 272; Tr. at 9. In such settings, the careless discharge of a weapon or failure to prevent or detect fire, theft, or accidental or willful destruction to property carries the attendant risk of catastrophic consequences. While counsel for appellees argued that we ought not be influenced by "nightmare scenarios," Tr. at 23, as we have already explained, the reasonableness of the testing plan is determined in part by the potential gravity of the feared harm.

In the context of this case, risk assessment weighs heavily, if not determinatively, in favor of reasonableness.

Nor can we agree with appellees that a different balance should be struck in the present case than in *Von Raab* and *Skinner* because "unlike Customs agents and railroad employees, the Army's civilian guards . . . possess undiminished privacy expectations." Supplemental Brief for Appellees at 6-7. We are, to say the least, baffled by this contention. Civilian guards and police undergo a variety of privacy diminishing tests and investigations as a condition of employment in a high-security, military context. Not only are security guards subject to a series of pre-employment screenings, including investigations into criminal, medical, employment, and educational histories, once hired, security personnel are subject to quarterly blood tests, annual medical examinations, annual criminal records checks, and periodic security investigations. J.A. at 275. *Von Raab* explicitly teaches that such intrusions may be expected to reduce one's expectation of privacy, and, hence, may enhance the reasonableness of testing. *Von Raab*, 109 S.Ct. at 1397 ("background investigations, medical examinations, or other instrusions . . . may be expected to diminish . . . expectations of privacy in respect of a urinalysis test"). *See also Skinner*, 109 S.Ct. at 1418 (noting that expectation of privacy reduced by requirement of periodic physical examinations). These employees' expectations of privacy are also reduced by the requirement that they report any illness or incident that results in use of prescription drugs. J.A. at 275.

In short, "[t]he operational realities of the workplace," *O'Connor v. Ortega*, 480 U.S. 709, 717 (1987) (plurality opinion), are such that "a diminished expectation of privacy attaches to information relating to the physical condition of covered employees," *Skinner*, 109 S. Ct. at 1419. Because the civilian guards' expectations of privacy are severely reduced as a condition of employment in a high-security, military context, mandatory, random urinalysis testing constitutes a modest additional privacy intrusion, and cannot, on this basis, be deemed unreasonable.

D.

The fourth category of tested positions includes those "[c]ivilian treatment staff of the Alcohol and Drug Abuse Prevention and Control Program (ADAPCP) whose duties involve direct contact with clients, civilian employees of the Army's Drug Testing Laboratories (DTL), and all employees involved in the chain of custody process for biochemical testing." J.A. at 203. Table 5.1 breaks down the employees into two classes: "direct service staff" – who, as best we can determine, are primarily drug counsellors – and employees at Army forensic drug testing laboratories. The Army initially justified testing these drug counsellors and laboratory workers as necessary to maintain the testing program's "continued credibility" and to ensure proper identification and treatment among other personnel. J.A. at 203. In this litigation the Army has similarly argued that testing is justified on the basis of its "strong integrity interest in insuring an absence of all drug use" within the Army. Brief for

Appellants at 34. In short, for these civilians "drug use is inconsistent with the job." *Id.* at 34-35.

The Army's assertion of "credibility" and "integrity" interests to support testing these civilians is akin to the rationale employed by *Von Raab* to approve the Customs Service's program of testing its front-line interdiction personnel. Although in *Harmon* we characterized the interest sanctioned by the Supreme Court as the "government's interest in maintaining the integrity of its workforce," *Harmon*, slip op. at 7, we noted that, taken to its logical end, the integrity rationale would justify the random testing of every federal employee – a result that would be inconsistent with *Von Raab's* essential teachings. *Id.* at 11 & n.7. Thus, in our view *Von Raab* rested not so much on the Service's undifferentiated interest in ensuring its reputation and credibility as on the myriad dangers posed by drug-using interdiction agents. The Court identified threats to the "national interest in self-protection," 109 S.Ct. at 1393, to "our Nation's first line of defense" against the scourge of illegal drugs, *id.* at 1392, and to the health and safety of the agents, who daily encounter a criminal element that "do[es] not hesitate to use violence to protect [its] lucrative trade and avoid apprehension," *id.*

In *Harmon* we concluded that the Justice Department's generic interest in the integrity of its workforce did not justify the testing of any of the three categories there under review: prosecutors in criminal cases, employees with access to grand jury proceedings, and personnel holding top secret national security clearances. *Harmon*, slip op. at 13. Although we conceded, *arguendo*,

the government's interest in preventing drug use by prosecutors "having substantial responsibility for the prosecution of federal drug offenders," *id.* (footnote omitted), we concluded that the responsibility rested with the Department of Justice to propose such a classification, *id.* at 19-24.

The most basic rationale to support testing ADAPCP personnel is that successful performance of their assigned duties may reasonably be viewed as depending on their abstinence from illicit drug use. It is apparent that drug counsellors who themselves use illicit drugs, like drug-using interdiction agents, may "because of their own drug use, [be] unsympathetic to their mission." *See Von Raab,* 109 S.Ct. at 1393. This concern is all the more pressing because of a drug counsellor's full-time, largely unstructured contact with drug users. While the consequences of a drug counsellor's misplaced sympathies may not be as extreme as those attributable to drug use by drug interdiction personnel – risks to "our Nation's first line of defense" against the mass importation of illegal drugs and to the health and safety of the agents – the Army maintains a legitimate interest in ensuring that its employees are allegiant to their essential mission.

As in the case of the "drug prosecutor" alluded to in *Harmon,* illicit drug use by an employee whose assigned duty is to counsel against the use of drugs is so dissonant with his responsibilities, he should reasonably expect to provide extraordinary assurances of trustworthiness and probity. While "most . . . government employees in general" have no reason to expect inquiry into their fitness and probity, *id.* at 1394, drug counsellors, like drug prosecutors, reasonably should expect heightened scrutiny into

activities which evidence such a basic infidelity to their mission.

The Army also possesses a legitimate interest in ensuring effective treatment and rehabilitation of known drug users. ADAPCP personnel service both military and civilian personnel, J.A. at 365, who, upon successful completion of a treatment and rehabilitation program are eligible to return to their former jobs, J.A. at 235-36. The Army's interest in rehabilitation is even more urgent when the client is a critical employee, who, it appears from the regulations, may remain in his critical position after testing positive for proscribed drugs. *See* AR 600-85 para. 5-14*c*(4). Thus, ADAPCP personnel represent a vital phase in the Army's campaign to detect and eradicate ongoing drug use. Their own drug use portends the possible frustration of these efforts.

The Army's compelling interest in preventing drug use among the other categories of critical personnel carries a collateral interest in ensuring effective detection. To this extent, serious governmental interests may be furthered by testing those in the laboratory and in the biochemical chain of custody, upon whom the legitimacy of the entire program depends. However, a drug-related lapse by such an employee does not portend either direct or irreparable harm, as would, for example, a lapse by an air traffic controller, pilot, or guard. Absent either a "clear, direct nexus" between the duties of a lab technician or other employee in the chain of custody and the nature of the feared harm, *Cf. Harmon*, slip op. at 11-12, and absent any compelling reason to expect that drug use will result in misplaced sympathies for their responsibilities, testing these employees lacks the necessary

causal connection between the employees' duties and the feared harm.

While it is certainly true that a drug-using lab technician might be susceptible to bribery, so might a drug-using antitrust prosecutor, who we concluded in *Harmon*, cannot be made subject to testing. We note that the likelihood of complicity is minimized by the absence of the tested individual's name on the specimen label. *See* HHS Reg. § 2.2(f) (19)-(20), 53 Fed. Reg. at 11,981 (label to include individual's specimen number and initials). Significantly, these personnel work in a more "traditional office environment[]" than the other employees we have considered, such that drug use might more easily be detected.[9] *See Von Raab*, 109 S. Ct. at 1395; *Harmon*, slip op. at 9. Further, there is nothing in the record to indicate that the laboratory personnel possess diminished expectations of privacy.[10] Because we have not been shown that the governmental interests in testing either laboratory workers or those in the specimen chain of custody outweigh the privacy expectations of those employees, we hold that the testing of these employees is not reasonable within the meaning of the Fourth Amendment.

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[9] Although different considerations may apply to the employee at the collection site – he may, for example, like the front-line interdiction agent in *Von Raab*, be expected to be tempted by bribes – we are not free to separate those within a particular classification who may be made subject to testing from those who may not. *See Harmon*, slip op. at 19-24.

[10] The HHS Regulations appear to require only that lab personnel provide the following information:

(Continued on following page)

IV.

The District Court correctly determined that the governmental interests in testing laboratory workers and those involved only in the chain of sample custody do not outweigh the individuals' expectations of privacy, and to that extent only we affirm its decision. We hold that random, mandatory urinalysis testing of those employees who occupy positions in the aviation, police/guard, and direct service staff (ADAPCP) program is reasonable. We acknowledge, of course, that the integrity of bodily freedom is a cherished value in our society, *cf. Schmerber v. California*, 384 U.S. 757, 772 (1966), and that drug testing limits that freedom. But because of the surpassing governmental interests supporting the testing and because of the employees' already diminished expectations of privacy, we believe that, on balance, testing these employees is reasonable. Because we are on the current record unable to assess the reasonableness of testing PRP employees, the case is remanded for further proceedings consistent with this opinion.

So ordered.

(Continued from previous page)

> resume of training and experience; certification or license, if any; references; job descriptions; records of performance evaluation and advancement; incident reports; and results of tests which establish employee competency for the position he or she holds.

HHS Reg. § 2.3(f), 53 Fed. Reg. at 11,982. It does not appear that laboratory personnel are required to make any extraordinary disclosures or to subject themselves to special investigations or tests.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-5080

September Term, 1988

NATIONAL FEDERATION OF FEDERAL EMPLOYEES, et al.

v.

FRANK C. CARLUCCI,
SECRETARY OF DEFENSE, et al., Appellants

And Consolidated Case Nos. 88-5081, 88-5082, 88-5244, 88-5245 and 88-5246

Order

It is ORDERED by the court, on the motion of the government parties, that the parties shall file statements, on or before April 28, 1989, of no more than 10 pages, on the question whether in light of *Skinner v. Railway Labor Executives' Assoc.*, No. 87-1155, 57 U.S.L.W. 4324 (U.S. March 21, 1989), and *NTEU v. Von Raab*, No. 86-1879, 57 U.S.L.W. 4338 (U.S. March 21, 1989), the subject drug testing programs are proscribed by the dictates of the Fourth Amendment. In their submissions, the parties should consider the following issue: To what extent, if any, does the testing of the various job classifications being considered in the present cases warrant differing treatment than that in *Skinner* and *Von Raab*.

For the Court:
Constance L. Dupre, Clerk

By: /s/ Fred Braun
Fred Braun
Deputy Clerk

April 10, 1989

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-5080

September Term, 1987

National Federation of Federal Employees, et al.,

Plaintiffs-Appellees

v.

Frank C. Carlucci, Secretary of Defense, et al.,

Defendants-Appellants

88-5081

American Federation of Government Employees, et al.,

Plaintiffs-Appellees

v.

Frank C. Carlucci, Secretary of Defense, et al.,

Defendants-Appellants

88-5082

American Federation of Government Employees, et al.,

Plaintiffs-Appellees

v.

Frank C. Carlucci, Secretary of Defense, et al.,

Defendants-Appellants

BEFORE: Buckley, Williams and D. H. Ginsburg, Circuit Judges

O R D E R

Upon consideration of appellants' motion for stay pending appeal, the opposition, and the reply thereto, it is

ORDERED by the court that the motion be granted. We conclude that a stay is warranted in this case. *See WMATA v. Holiday Tours, Inc.*, 559 F.2d 841, 843-44 (D.C. Cir. 1977).

Per Curiam

March 30, 1988

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-5080

September Term, 1987

National Federation
of Federal Employees,
et al.

v.

Frank C. Carlucci, Secretary
of Defense, et al.,
Appellants

And Consolidated Cases

No. 88-5244
National Federation of
Federal Employees,
et al.

v.

Frank C. Carlucci, Secretary
of Defense, et al.,
Appellants

And Consolidated Cases

Before: Wald, Chief Judge, Mikva and Sentelle, Circuit Judges

ORDER

Upon consideration of appellants' motion to consolidate Nos. 88-5244, et al. with No. 88-5080, et al., it is

ORDERED, by the Court, that appellants' aforesaid motion is granted and Nos. 88-5244, et al. and Nos. 88-5080, et al., are hereby consolidated. And, it is

FURTHER ORDERED, by the Court, that the briefing schedule established on May 2, 1988, in Nos. 88-5080, et al. shall apply to Nos. 88-5244 as well. And, it is

FURTHER ORDERED, by the Court, sua sponte, that No. 88-5080, *National Federation of Federal Employees, et al. v. Frank C. Carlucci, Secretary of Defense, et al.*, is hereby established as the lead docket. All pleadings should contain this caption and number.

Per Curiam
For the Court:
Constance L. Dupre, Clerk

By: /s/ Linda E. Jones
Linda E. Jones
Deputy Clerk

August 11, 1988

APPENDIX E

NATIONAL FEDERATION OF FEDERAL EMPLOYEES, et al., Plaintiffs,

v.

Frank C. CARLUCCI, Secretary of Defense, et al., Defendants

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, et al., Plaintiffs,

v.

Frank C. CARLUCCI, Secretary of Defense, et al., Defendants.

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES et al., Plaintiffs,

v.

Frank C. CARLUCCI, Secretary of Defense, et al., Defendants.

Civ. A. Nos. 86-0681, 87-1797 and 87-2350.

United States District Court, District of Columbia.

July 6, 1988.

MEMORANDUM OPINION

THOMAS F. HOGAN, District Judge.

On March 1, 1988, this Court entered a preliminary injunction against random urinalysis drug testing of civilian employees of the United States Department of the Army. *National Federation of Federal Employees v. Carlucci,*

680 F.Supp. 416 (D.D.C.1988), *appeal docketed*, No. 88-5080 (D.C.Cir. March 16, 1988). After a hearing on March 11, 1988, the Court entered orders clarifying the preliminary injunction and denying defendants' motion for a stay pending appeal. On March 30, 1988, the Court of Appeals granted defendants' motion for a stay pending appeal. No 88-5080 (D.C.Cir. Mar. 30, 1988) (order granting stay pending appeal).

At the hearing on March 11, 1988, defendants' counsel moved for entry of final judgment, announcing themselves satisfied with the state of the record. Plaintiffs' counsel opposed the motion on the ground that additional discovery was required. The Court denied the motion for entry of final judgment. The discovery sought by plaintiffs has now been completed, and defendants have renewed their motion for entry of final judgment.

The Court addressed the substantial and difficult issues presented by random urinalysis drug testing at length in its Memorandum Opinion of March 1, 1988. There is no need to replow that ground. Instead, the Court will review relevant developments, factual and legal, of the past four months and, incorporating its earlier Memorandum Opinion, enter a permanent injunction pursuant to Fed.R.Civ.P. 65(a)(2). The Court concludes, with the assent of counsel for both parties, that in light of the Court's analysis there remain no genuine issues of material fact for trial and judgment is appropriate under Fed.R.Civ.P. 56. This Memorandum Opinion and the Memorandum Opinion of March 1, 1988, constitute the Court's findings of fact and conclusions of law.

Factual Developments

The parties have entered into a number of stipulations of fact that are relevant to the issues presented. The stipulations, which were made a part of the record by filing with the Clerk on June 27, 1988, can be summarized as follows:

– In implementing the Army civilian drug testing program,[1] defendants did not rely upon any statistical information concerning the incidence of accident or safety violations by employees subject to testing, or the incidence of accident or safety violations caused by the use of tested-for drugs among covered employees.

– In implementing the Army civilian drug testing program, defendants did not rely upon any statistical information concerning the incidence of security violations by covered employees, or the incidence of security violations caused by use of tested-for drugs among covered employees.

– In implementing the Army civilian drug testing program, defendants did not rely upon any statistical

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[1] The Army civilian drug testing program was implemented by Interim change No. I11, issued on February 10, 1986. Interim Change No. I11 amended Army regulation 600-85 to include drug testing of civilians. Interim Change No. I11 was issued pursuant to Department of Defense Directive 1010.9, which authorized each military department to establish a Civilian Employees Drug Abuse Testing Program. Directive 1010.9 was issued on April 8, 1985.

information concerning the incidence of blackmail of covered employees, or the incidence of blackmail caused by use of tested-for drugs among covered employees.

– In designing the Army civilian drug testing program, defendants relied on no statistical information other than the Highlights from the *1983 Worldwide Survey on Nonmedical Drug and Alcohol Use*.[2] Particularly, defendants had no information, other than anecdotal information, regarding: the number of covered employees who used tested-for drugs; the number of covered employees who used tested-for drugs while off duty; the number of covered employees who used tested-for drugs on duty or immediately before reporting for work; the number of covered employees rated less than satisfactory or disciplined because of abuse of tested-for drugs; the number of employees rated less than satisfactory or disciplined because of alcohol abuse.

– The *1983 Worldwide Survey of Nonmedical Drug and Alcohol Use* did not tabulate the number of covered employees who used tested-for drugs.

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[2] The survey, prepared under contract for the Department of Defense, was based on responses to questionnaires mailed to more than 7,000 randomly selected civilian employees of the Department in 1982; 5,154 responses were received. The survey showed that 4 percent of the surveyed employees used some type of drug for nonmedical purposes within the past 30 days; marijuana was the only drug reported in statistically meaningful numbers. By contrast, 14 percent of the civilian employees were classified as "heavy drinkers" on an average day in the past 30 days, that is, consuming four or more drinks. The survey report is included in the June 27, 1988, filing of the parties.

– A confirmed positive urinalysis test result for marijuana cannot show that the person regularly has been using marijuana or in the future will regularly use marijuana.

– A confirmed positive urinalysis test result cannot determine the date a tested-for drug entered the body.

– A confirmed positive urinalysis test result cannot distinguish between a casual user of a drug and a chronic user of a drug.

– In implementing the Army civilian drug testing program, defendants did not have and did not rely on department-wide information concerning instances of discharge of weapons by civilian guards and police in the line of duty excluding training.

These stipulations of fact support the Court's previous finding that military's civilian drug testing initiative "is not rooted in the discovery of any particular drug problem among its civilian employees or any group of those employees." 680 F.Supp. at 420.

The Court's March 1, 1988, Memorandum Opinion reported results of Army civilian drug testing for a six-month period ending March 31, 1987, which showed 37 positive results in 5,397 urine tests, or .68 percent. 680 F.Supp. at 421. Defendants updated these figures in their Motion for Stay Pending Appeal. In the first 16 months of Army civilian drug testing, through January 31, 1988, a total of 11,233 urinalysis tests were conducted; 74 positive results were obtained or .66 percent. Of the 74 positive results, 63 were for marijuana, 8 were for cocaine, and 3 were for both. Plaintiffs' Revised Set of Requests for

Admissions No. 23 asked defendants to "Admit that the metabolites identified by urinalysis for covered drugs are not psychoactive." The Supplemental Response executed on June 6, 1988, by Dr. Donna R. Smith,[3] states: "Admitted, insofar as the substances identified in the Army testing program for marijuana and cocaine are metabolites." Thus a positive test result does not show the presence of *active* ingredients of marijuana and cocaine, but *inactive* metabolites.[4]

A number of other responses to Plaintiffs' Revised Set of Requests for Admissions, Interrogatories and Request for Production of Documents are worth noting as well. The defendants' response was executed on May 3, 1988, again by Dr. Smith.

Defendants were asked to admit that no accidents or safety violations by covered employees were caused by employee drug use or being under the influence of a tested-for drug. The defendants said they could neither admit nor deny the statement, because post-accident investigations, even where drug testing is performed, do "not necessarily reach conclusions as to whether the accident was caused by drug use as opposed to some other

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[3] Civilian Program Administrator, Alcohol and Drug Policy Office, Office of the Deputy Chief of Staff for Personnel, Headquarters, Department of the Army.

[4] The Supplemental Response also states, "The compounds identified in tests for amphetamines, barbiturates, and phencyclidine are unmetabolized psychoactive substances." However, the Army has never reported a positive test result for those drugs, presumably because they are not tested for.

human error." The response to Request No. 2 continued: "[N]o reported accident was identified in which a covered employee, subsequently-examined for 'tested for' drugs, was determined to have committed some human error attributed to drug use which caused the reported accident."

Nor could defendants point to any instance of blackmail of covered employees attributed to the employee's use of a tested-for drug. *See* Response to Request No. 5. The only instance of a security violation attributed to the use of a tested-for drug by a covered employee was at the Seneca Army Depot in Romulus, New York, on July 4, 1985, when a security guard reported that another guard had twice used cocaine while on duty. *See* 680 F.Supp. at 421 n. 5.

Other May 3, 1988, admissions that are relevant include:

> No. 11. Admit that Department of Defense has no statistics demonstrating a problem of on-duty drug-related impairment among covered employees.
>
> *Response:* Admitted.
>
> No. 14. Admit that urinalysis tests do not test whether the subject is under the influence of, or impaired by, a tested for drug at the time the test is administered.
>
> *Response:* Admitted.
>
> No. 15. Admit that a confirmed positive urinalysis test does not indicate that a person is presently impaired by the drug at the time of the urinalysis test.
>
> *Response:* Admitted.

No. 16. Admit that a confirmed positive urinalysis test does not indicate that a person's performance of his or her duties were affected by the drug.

Response: Admitted.

No. 19. Admit that urinalysis testing cannot determine the dosage of a drug which was consumed.

Response: Admitted.

No. 24. Admit that defendants are not able to identify any studies which correlate the reported immediate effects of marijuana intoxication, such as loss of short term memory and a decrease in physical coordination, with urinalysis results which are positive for marijuana.

Response: Admitted.

No. 25. Admit that defendants are not able to identify any studies which correlate prior marijuana use, more than 24 hours before reporting to work, with on the job impairment.

Response: Admitted.

The Court notes that the government disavows the position that urinalysis drug testing can detect on-duty impairment caused by marijuana or cocaine. The government now acknowledges that urinalysis drug testing detects any recent use of tested-for drugs, *off-duty* as well as on-duty. Since it cannot show that off-duty use necessarily has an effect on work performance, *see* Response to Request No. 16, *supra*, the government has advanced two other arguments as justifying the suspicionless search represented by random urinalysis:

First, defendants argue that off-duty drug use may have "hangover effects." The Court previously found

these alleged effects to be insufficient justification for the intrusion of random urinalysis testing. 680 F.Supp. 428-29 n. 11. The defendants admit that the scientific evidence of hangover effects is "inconclusive." Defendants' Motion for Stay Pending Appeal at 6.

Second, defendants argue that off-duty drug use "has relevance to the probability of on-duty impairment, and thus might reasonably be considered by an employer in determining whether to maintain an employee in a position involving significant safety concerns. That is all that is required to meet the government's burden of showing that drug tests are 'reasonably related to the objectives' of on-the-job safety and security." Appellants' Motion for Stay Pending Appeal at 9-10, No. 88-5080 (D.C.Cir. Mar. 16, 1988) (quoting *Jones v. McKenzie*, 833 F.2d 335, 340 (D.C.Cir.1987) (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 342, 105 S.Ct. 733, 743, 83 L.Ed.2d 720 (1985))), *petition for cert. filed*, 56 U.S.L.W. 3739 (U.S. Apr. 15, 1988) (No. 87-1706).

The Court has two reactions to this argument. First, it disagrees that the law requires only that the test "has relevance to the probability of on-duty impairment." The government would ask the Court to find the requirement of "reasonably related" satisfied by *any* relationship. Presumably, the government would consider the requirement satisfied if off-duty drug user were 1 percent more likely to use drugs on duty than those who do not use drugs off duty. In short, *any* predictive value would satisfy the "reasonably related" requirement in the government's view. Surely, something more than *any relationship* is required. The question becomes, How strong is the relationship? The government does not know. In fact, it

admits "that defendants are not able to identify any studies which correlate prior marijuana use, more than 24 hours before reporting to work, with on the job impairment." Response to Request No 25, *supra*.

Second, the Court remains unconvinced by the July 20, 1987, declaration of George E. Woody, M.D., that many off-duty users of drugs will undergo a "rapid escalation of drug use" that will manifest itself in on-the-job impairment. Woody Decl., ¶8. "The result is more frequent use and a greater likelihood of becoming impaired while at work." *Id.*, ¶9. Woody cites no studies to support his view, and indeed the government admits that none exist with respect to marijuana. Response to Request No. 25, *supra*. The court has received absolutely no evidence of the *likelihood* of such a "rapid escalation of drug use" and is unable to give Woody's unsupported statement any weight for purposes of this analysis. The government has announce itself satisfied with the record, and the record fails to support a meaningful correlation between off-duty drug use and on-duty impairment. While "scientific certainty" is not required, mere speculation is not sufficient. *See Berry v. District of Columbia*, 833 F.2d 1031, 1035 (D.C.Cir.1987) (to justify testing of arrestees, government "must proffer reliable evidence, statistical or otherwise, from which the trial court can reasonably conclude that drug use makes it significantly more likely that an arrestee will commit crimes or fail to appear for scheduled court dates").

A critical difficulty with urinalysis drug testing is that it does not show whether a person is using drugs on the job or poses a significant risk of doing so. A positive result may indicate on-the-job impairment, or it may not;

a positive result may increase the odds of future on-the-job impairment, or it may not. The testing simply reveals too little about on-duty activity to make it "reasonably related" to its legitimate purpose, while at the same time revealing so much about off-duty activities as to make it "excessively intrusive." *See Jones v. McKenzie*, 833 F.2d at 340 (quoting *T.L.O.*, 469 U.S. at 342, 105 S.Ct. at 743).

Legal Developments

On the day before the Court preliminarily enjoined Army civilian drug testing, the Supreme Court granted certiorari in *National Treasury Employees Union v. Von Raab*, 816 F.2d 170 (5th Cir.1987), *cert. granted*, ___ U.S. ___ , 108 S.Ct. 1072, 99 L.Ed.2d 232 (1988). More recently, the Court granted certiorari in a second drug testing case, *Railway Labor Executives' Association v. Burnley*, 839 F.2d 575 (9th Cir.), *cert. granted*, ___ U.S. ___ , 108 S.Ct. 2033, 100 L.Ed.2d 618 (1988), and set the cases for oral argument in tandem. While Supreme Court guidance on drug testing is of course welcome, the Court notes that neither case involves random testing.

Another relevant development occurred on March 29, 1988, when Judge Ramsey entered a permanent injunction against random drug testing of two civilian employees of the Army at Aberdeen Proving Ground in Aberdeen, Maryland. *Thomson v. Weinberger*, 682 F.Supp. 829 (D.Md.1988), *appeal docketed*, No. 88-2838 (4th Cir. June 3, 1988). The testing was part of the same program at issue in this case. Judge Ramsey, who had entered a preliminary injunction against testing of the two employees on February 27, 1987, said he supported the

result reached by this Court but "is somewhat uncomfortable with *NFFE's* apparent reliance on the technological merit of the urinalysis itself. By concluding that the Army's test is too imprecise to use in random testing, the *NFFE* Court implies that random use of a better test would be constitutional. Because it cannot let an individual's Fourth Amendment rights turn on the ebb and flow of technological changes, this Court must offer a separate basis for reaching *NFFE's* result." 682 F.Supp. 832-33 n. 9.

Fair enough. The Court would merely note that Judge Ramsey was not constrained by *Jones v. McKenzie's* suggestion that a test measuring on-duty impairment would have a satisfactory nexus to the employer's legitimate concern, in that case, safety. *See*, 833 F.2d 340-41.

The Administration has continued to press its program to test all federal workers in "sensitive" jobs. On May 3, 1988, 42 federal agencies sent detailed plans to Congress calling for random testing of 345,528 federal workers. *U.S. Details Plans for Drug Tests*, Wash. Post, May 4, 1988, at A1, Col 6. The testing plan of the Federal Bureau of Prisons of the United States Department of Justice already has been struck down as unconstitutional. *American Federation of Government Employees v. Meese*, 688 F.Supp. 547 (N.D.Cal. 1988). The Bureau of Prisons designated all of its 13,000 employees, including administrators, secretaries, and other office workers, as "sensitive" and subject to random testing. At 548-49. In entering a preliminary injunction, Senior Judge Weigel distinguished between government attempts to deter drug use in the federal workplace and efforts to deter drug use in

general. "The government may certainly take an interest in deterring drug use throughout society, but that interest cannot justify random testing. Otherwise, mass testing of the entire population of the nation would be justified. . . . The government, the nation's largest employer, may not hide behind that role in attempting to justify intrusive searches of innocent citizens who happen to be in its employ, absent some compelling, articulable interest of the government *qua* employer." *Id.* at 554-55 (citing *National Federation of Federal Employees v. Weinberger*, 818 F.2d 935, 943 n. 12 (D.C.Cir. 1987).

On June 27, 1988, the Justice Department announced plans to test 1,800 of its 6,500 attorneys and other "sensitive" employees working in the Washington, D.C., area in as soon as 60 days. *Justice Dept. Sets Employee Drug Tests*, Wash. Post, June 28, 1988, at A13, col. 1. The following day 42 of those to be tested filed suit, challenging the plan. *Harmon v. Meese*, No. 88-1766 (D.D.C. filed June 28, 1988).

A final legal development is worth noting. Until this year, the government could argue that circuits addressing the issue had upheld drug testing without individualized suspicion. *See Jones v. McKenzie*, 833 F.2d 335 (D.C.Cir. 1987); *National Treasury Employees Union v. Von Raab*, 816 F.2d 170 (5th Cir. 1987), *cert. granted*, ___ U.S. ___, 108 S.Ct. 1072, 99 L.Ed.2d 232 (1988); *McDonell v. Hunter*, 809 F.2d 1302 (8th Cir. 1987); *Shoemaker v. Handel*, 795 F.2d 1136 (3d Cir.), *cert. denied*, 479 U.S. 986, 107 S.Ct. 577, 93 L.Ed.2d 580 (1986). In 1988, however, two circuits struck down testing not based on individualized suspicion.

First, the Ninth Circuit struck down post-accident testing of railroad workers absent a reasonable suspicion that a test will reveal evidence of current drug or alcohol impairment. *Railway Labor Executives' Association v. Burnley*, 839 F.2d 575 (9th Cir.), *cert. granted*, ___ U.S. ___, 108 S.Ct. 2033, 100 L.Ed.2d 618 (1988). More recently, the Sixth Circuit struck down mandatory urinalysis testing of fire fighters, *Lovvorn v. City of Chattanooga*, 846 F.2d 1539 (6th Cir. 1988), and police officers, *Penny v. Kennedy*, 846 F.2d 1563 (6th Cir. 1988).

Conclusion

An appropriate Order entering final judgment and a permanent injunction accompanies this Memorandum Opinion. The only issue remaining is whether the Court should stay the permanent injunction pending appeal. Most regrettably, the D.C. Circuit offered no guidance when it stayed the preliminary injunction pending appeal. The motions panel revealed none of its reasoning when it stated, "We conclude that a stay is warranted in this case. *See WMATC v. Holiday Tours, Inc.*, 559 F.2d 841, 843-44 (D.C.Cir.1977)." No. 88-5080 (D.C.Cir. Mar. 10, 1988) (order granting stay pending appeal). Such terseness leaves the Court and the parties without insight into the motions panel's logic in a matter where this Court has found an ongoing violation of employees' constitutional rights with possibly severe effects on their careers. This uncertainty is even more unfortunate because it was so avoidable.

The court can only assume that the Court of Appeals has determined that the Army civilian drug testing program should go forward while this case is appealed.[5] The Court fully explored the factual and legal basis of its holding in its March 1, 1988, Memorandum Opinion; while subsequent developments have reinforced the holding, they are not sufficient for the Court to say that today's Memorandum Opinion stands on different footing than its prior decision. Accordingly, the Court shall stay the permanent injunction pending appeal.

ORDER

Upon consideration of defendants' motion for entry of final judgment and the entire record herein, and for the reasons set forth in the accompanying Memorandum Opinion, it is this 6th day of July, 1988,

ORDERED that judgment is entered for plaintiffs; and it is

FURTHER ORDERED that defendants are hereby permanently enjoined from implementing or enforcing Department of Defense Directive 1010.9 and Interim

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[5] On April 15, 1988, the Court of Appeals granted appellees' motion to expedite and directed the case set for argument during the Court's October, 1988, sitting, on the same day and before the same panel reviewing *American Federation of Government Employees v. Dole*, 670 F.Supp. 445 (D.D.C.1987) (upholding random urinalysis drug testing of employees of Department of Transportation), *appeal docketed*, No. 87-5417 (D.C.Cir. Dec. 11, 1987).

Change No. I11, amending Army Regulation 660-85, as they pertain to drug testing on a random basis or "on the basis of neutral criteria" of civilian employees of the Department of the Army. This injunction shall not apply to drug testing based upon reasonable suspicion. This injunction also shall not apply to drug testing of applicants for employment, consensual rehabilitative testing, or post-accident testing; and it is

FURTHER ORDERED that the permanent injunction is stayed pending appeal.

APPENDIX F

NATIONAL FEDERATION OF FEDERAL EMPLOYEES, et al., Plaintiffs,

v.

Frank C. CARLUCCI, Secretary of Defense, et al., Defendants.

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, et al., Plaintiffs,

v.

Frank C. CARLUCCI, Secretary of Defense, et al., Defendants. (Two Cases)

Civ. A. Nos. 86-0681, 87-1797 and 87-2350

United States District Court, District of Columbia.

March 1, 1988.

MEMORANDUM OPINION

THOMAS F. HOGAN, District Judge.

Two unions seek to enjoin compulsory random urinalysis drug testing of certain civilian employees of the Department of the Army. These consolidated actions are before the Court on plaintiffs' application for an expanded preliminary injunction and defendants' motion for summary judgment. As an employer, the government has a compelling safety interest, in some instances, in

maintaining a drug-free work*place;* it has not demonstrated, however, that urinalysis drug testing is capable of showing whether an individual is impaired by drugs or under the influence of drugs. Under *Jones v. McKenzie,* 833 F.2d 335, 340-41 (D.C.Cir.1987), urinalysis drug testing lacks the necessary nexus to the employer's safety concern to satisfy the Fourth Amendment. The government's nonsafety interests in maintaining a drug-free civilian work *force* are not sufficiently compelling to justify the substantial intrusion of mandatory, random urinalysis. Thus, the defendants have failed to show that the Army's civilian testing program is consistent with the Fourth Amendment. Accordingly, the Court shall deny defendants' motion for summary judgment and grant plaintiffs' application for an expanded preliminary injunction.

The Court is aware that its decision cannot be squared with *Mullholland v. Department of the Army,* 660 F.Supp. 1565 (E.D.Va.1987)(upholding random urinalysis drug testing of civilian employees at Army air base), *appeal docketed,* No. 87-2145 (4th Cir. Aug. 13, 1987), and *American Federation of Government Employees v. Dole,* 670 F.Supp. 445 (D.D.C.1987)(upholding random urinalysis drug testing of employees of Department of Transportation), *appeal docketed,* No. 87-5417 (D.C.Cir. Dec. 11, 1987). On the other hand, it is in conformity with *Thomson v. Weinberger,* No. R-87-393 (D.Md. Feb. 27, 1987)(granting preliminary injunction to two civilian employees of Department of Army), and *Railway Labor Executives' Association v. Burnley,* 839 F.2d 575 (9th Cir.1988)(holding unconstitutional federal regulations mandating drug tests of railroad employees after certain train accidents). To

date, courts have confronted the difficult issues posed by random drug testing without benefit of direct guidance from the Supreme Court, though the Court recently granted certiorari in *National Treasury Employees Union v. Von Raab*, 816 F.2d 170 (5th Cir.1987), *cert. granted*, ___ U.S. ___, 108 S.Ct. 1072, 99 L.Ed.2d 232 (1988) (No. 86-1879). The Court invites defendants to appeal this decision pursuant to 28 U.S.C. § 1292(a))1) (1982); additionally, the Court respectfully suggests that the Court of Appeals consolidate the appeal in this action with that in *American Federation of Government Employees v. Dole* and consider scheduling the cases for *en banc* hearing as presenting a question of exceptional importance. *See* Fed.R.App.P. 35(a)(2).

I. Procedural Background

The Army's program of random urinalysis drug testing of civilian employees has been the subject of no less than six court challenges since it was devised in 1986. Three of those suits have been consolidated into the present action.[1]

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[1] One of the other three cases, filed by a union seeking a nationwide injunction, was dismissed without prejudice on grounds of comity and judicial efficiency. *American Federation of Government Employees v. Weinberger*, No. C86-242T (W.D.Wash. Aug. 5, 1986) [Available on WESTLAW, 1986 WL 15495]. Two cases were filed by individuals: *Mullholland v. Department of the Army*, 660 F.Supp. 1565 (E.D.Va.1987), *appeal docketed*. No. 87-2145 (4th Cir. Aug. 13, 1987) (denying injunction sought for 50 employees at Army air base) and *Thomson v. Weinberger*, 682 F.Supp. 829 (D.Md.1987) (granting preliminary injunction to pipefitter and research biologist).

The first of these consolidated cases was filed in this district under the name *National Federation of Federal Employees v. Weinberger,* Civil Action No. 86-0681. Plaintiffs are the National Federation of Federal Employees (NFFE), a labor organization whose membership includes civilian employees of the Department of the Army; NFFE Local 2058, which represents a bargaining unit of 190 civilian guards employed by the Army at the Aberdeen Proving Ground in Maryland; and Charles W. Jackson, a civilian Aberdeen guard and president of Local 2058. Defendants are the Secretary of Defense, the Secretary of the Army, and the commanding officer of Aberdeen Proving Ground.

This Court on June 23, 1986, denied an application for a preliminary injunction and dismissed the case, holding that it lacked subject matter jurisdiction when the union had not yet pursued its challenge before an appropriate administrative tribunal. *National Federation of Federal Employees v. Weinberger,* 640 F.Supp. 642 (D.D.C. 1986). The Court of Appeals for the District of Columbia Circuit reversed that decision on May 15, 1987. *National Federation of Federal Employees v. Weinberger,* 818 F.2d 935 (D.C.Cir.1987) (Edwards, J.). The Court of Appeals declined to decide the Fourth Amendment issues, remanding the case for findings of fact with respect to the nature and scope of the drug testing program. *Id.* at 942. The Court of Appeals did provide guidance on the constitutional issues, however, in the form of "general principles." Among them is the holding that compulsory urinalysis of public sector employees is a "search and seizure" within the meaning of the Fourth Amendment.

Id. at 942-43. The Court of Appeals also provided a framework for determining the reasonableness of compulsory urinalysis, *id.*, which of course will be utilized here.

The second case was filed as *American Federation of Government Employees v. Weinberger* in the Southern District of Georgia. Plaintiffs are the American Federation of Government Employees (AFGE), a labor organization representing civilian employees of the Department of the Army; AFGE Local 1922, which represents 2,200 civilian employees at Fort Stewart, Georgia; and William Cox, Thomas R. Daniels, Joseph Lane, and James Johnson, civilian police officers employed by the Army at Fort Stewart. Defendants are the Secretary of Defense, the Secretary of the Army, and the commander of operations at Fort Stewart. On December 2, 1986, Judge Edenfield issued a preliminary injunction against urinalysis drug testing of any civilian police officer at the Fort Stewart/Hunter Army Airfield military installation absent reasonable suspicion that the employee has engaged in drug use. *American Federation of Government Employees v. Weinberger*, 651 F.Supp. 726 (S.D.Ga.1986). The court held that urinalysis drug testing without individualized suspicion is unreasonable under the Fourth Amendment. *Id.* at 733. Plaintiffs had requested a nationwide injunction, but Judge Edenfield saw fit to limit his order geographically so as not to conflict with this Court's earlier decision in *National Federation of Federal Employees v. Weinberger*, 640 F.Supp. 642 (D.D.C.1986). On June 29, 1987, after the Court of Appeals for the District of Columbia Circuit ruled in *National Federation of Federal Employees v. Weinberger*, 818 F.2d 935 (D.C.Cir.1987), the Georgia District

Court, *sua sponte*, ordered *American Federation of Government Employees v. Weinberger* transferred to this Court. The case was assigned Civil Action No. 87-1797.

The third case was filed as *American Federation of Government Employees v. Weinberger* in the Eastern District of California. Plaintiffs are the American Federation of Government Employees (AFGE); AFGE Local 1546, which represents 355 civilian employees at Sharpe Army Depot in Lathrop, California; and Rosemarie Alyce Duff, Dewey Lee, Monseis M. Ramos, Ronald George Spooner, and Daniel I. Straight, civilian guards and police officers at Sharpe Army Depot. Defendants are the Secretary of Defense, the Secretary of the Army, and the commander of Sharpe Army Depot. Plaintiffs sought a nationwide injunction against testing of civilian employees. The court declined to address the application for a preliminary injunction, instead granting on August 4, 1987, defendants' motion to transfer the case to this Court, where it was assigned Civil Action No. 87-2350.

The three cases were consolidated in the present action and the Court received extensive briefing, reviewed voluminous exhibits, and heard oral argument on plaintiffs' motion for an expanded preliminary injunction and defendants' motion for summary judgment on September 16, 1987.

II. Facts

A. Directive 1010.9

On April 8, 1985, the Department of Defense issued Directive 1010.9 authorizing each military department to

establish a Civilian Employees Drug Abuse Testing Program. Under the Directive, civilian employees in "critical jobs" and applicants for those jobs may be required to participate (and to sign a form agreeing to participate) in urinalysis drug testing in the following four circumstances: 1) before appointment or selection; 2) periodically thereafter "on the basis of neutral criteria"; 3) when there is probable cause to believe that the employee is "under the influence of a controlled substance[2] while on duty"; and 4) in the course of investigating an accident "for the purpose of accident analysis and the development of countermeasures."

Jobs could be designated as "critical" only if they fell in a category deemed "sufficiently critical to the DoD mission or protection of public safety that screening to detect the presence of drugs is warranted as a job-related requirement": 1) jobs in law enforcement; 2)"[p]ositions involving the national security or the internal security of the Department of Defense in which drug abuse could cause disruption of operations, destruction of property, threats to the safety of personnel, or the potential for unwarranted disclosure of classified information"; 3) jobs involving protection of property or persons from harm.

The program has three stated purposes:

> 1. Assist in determining fitness for appointment or assignment to, or retention in, a critical job.
>
> 2. Identify drug abusers and notify them of the availability of appropriate counseling,

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[2] The Directive defines "controlled substance[s]" as those listed in 21 U.S.C. § 812 (1982 & Supp. III 1985).

referral, rehabilitation, or other medical treatment.

3. Assist in maintaining the national security and the internal security of the Department of Defense by identifying persons whose drug abuse could cause disruption of operations, destruction of property, threats to the safety of themselves and others, or the potential for unwarranted disclosure of classified information through drug-related blackmail.

The Department of Defense's initiative is not rooted in the discovery of any particular drug problem among its civilian employees or any group of those employees. Rather, the program is a result of two factors. The first is the success of the Department of Defense in curbing illegal drug use among military personnel through urinalysis drug testing, including random urinalysis. Defendants cite surveys and studies showing a marked decrease in drug use after the uniformed services began widescale urinalysis testing.[3] In 1980, 27 percent of military personnel reported nonmedical drug use within the past 30 days; in 1982 the figure declined to 19 percent and in 1985 the percentage dropped to 9 percent.

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[3] Compulsory urinalysis of military personnel withstood constitutional challenge in *Murray v. Haldeman*, 16 M.J. 74 (C.M.A.1983), and *Committee for GI Rights v. Callaway*, 518 F.2d 466 (D.C.Cir.1975). The Court of Appeals noted "the differences between military and civilian life and the constitutional standards to be applied to each," 518 F.2d at 474, and said the increased incidence of drug abuse in the armed Forces "poses a substantial threat to the readiness and efficiency of our military forces." *Id.* at 476.

The second factor leading to the Department of Defense civilian drug testing program was the general national concern with the problem of illegal drug use. It is beyond dispute that the nation suffers immensely from illegal drug use and that workers *impaired* by drugs on the job are less safe, reliable, and productive. The defendants do not contend that this problem is particularly prevalent among federal workers[4] or civilian employees of the Department of Defense. For example, a 1983 report based on a survey of 7,000 randomly selected civilian employees of the Department of Defense showed only 4 percent of those employees used drugs for nonmedical purposes within the past 30 days. Even the anecdotal evidence of on-duty drug abuse by civilian employees is sparse and unconvincing.[5] Additionally, the results of

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[4] "There is no evidence that federal employees as a group are any more or less likely to abuse illegal substances than the population as a whole." Declaration of J. Michael Walsh, Ph.D., Director of Workplace Initiatives, National Institute on Drug Abuse, August 11, 1987.

[5] For example, the government submitted the declaration of Captain Bernard Leavitt of the Seneca Army Depot in Romulus, New York. Leavitt related an incident that occurred on July 4, 1985, when a security guard reported that another guard had twice used cocaine while on duty. An investigation revealed that other guards had observed the drug use on earlier occasions but had not reported it. Other "evidence" cited by the government consists primarily of positive results from urinalysis testing. This testing does not show on-duty impairment, however, but merely recent ingestion, as will be seen.

compulsory random urinalysis fail to demonstrate a serious drug abuse problem among civilian employees of the Army. In the six-month period ending March 31, 1987, the Army tested the urine of 5,397 employees covered by the Civilian Employees Drug Abuse Testing Program. A total of 37 positive results were obtained, or .68 percent.[6] Thirty employees tested positive for marijuana metabolites; four tested positive for cocaine metabolites; and three tested positive for both marijuana and cocaine metabolites.

B. Executive Order No. 12,564

The Department of Defense authorized its Civilian Employees Drug Abuse Testing Program, and the Army implemented it, at a time when the nation was focusing increased attention on the problems caused by illegal drugs. On March 3, 1986, the President's Commission on Organized Crime, citing the failure of law enforcement efforts to reduce the supply of drugs, recommended "suitable drug testing" for *all* federal employees and

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[6] Similar results were obtained in the first few months of drug testing of civilian employees of the Department of Transportation. A total of 890 workers were subjected to random urinalysis; seven positive test results were obtained, or .79 percent. *Results Show Federal Drug Testing Not Fail-Safe*, Wash. Post, Feb. 21, 1988, at A1, col. 2. That figure does not include the positive test result reported for Malcolm Tindall, an air traffic controller at Santa Rosa Tower in northern California; that positive result, Department of Transportation officials later acknowledged, was a mistake. They attributed the error to the private testing laboratory under contract to the Department of Transportation. *Id.*

employees of federal contractors as part of a renewed effort to reduce the demand for illegal drugs. President's Commission on Organized Crime, *America's Habit: Drug Abuse, Drug Trafficking, and Organized Crime* 450, 483 (1986). On September 14, 1986, the President and First Lady addressed the nation on television, launching a "national crusade" against drug abuse. President's Address to the Nation: National Campaign Against Drug Abuse, 22 *Weekly Comp. Pres. Doc.* 1183, 1185 (Sept. 14, 1986).

The next day, September 15, 1986, President Reagan signed Executive Order No. 12,564, "Drug-Free Federal Workplace," 3 C.F.R. 224 (1987), directing all agency heads to develop programs to test "for the use of illegal drugs by employees in sensitive positions," *id.* at 226, and condemning the use of illegal drugs "on or off duty." *Id.* at 225. The President stated that drug testing "shall not be conducted pursuant to this Order for the purpose of gathering evidence for use in criminal proceedings." *Id.* at 228. He added: "Agencies are not *required* to report to the Attorney General for investigation or prosecution any information, allegation, or evidence relating to violations of Title 21 of the United States Code received as a result of the operation of drug testing programs established pursuant to this Order." *Id.* (emphasis added.)[7]

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[7] Congress limited the use that can be made of drug test results. For example, no disclosure to law enforcement officials is permitted without the employee's consent. Supplemental Appropriations Act of 1987, Pub.L. 100-71, 503(e), 101 Stat. 391, 471.

Some members of Congress expressed misgivings about the scope of the testing of federal employees contemplated by Executive Order No. 12,564. As part of a compromise, Congress delayed widespread testing, but exempted a number of agencies, including the Department of the Army, the Department of Transportation, some employees of the Department of Energy, the Central Intelligence Agency, the Bureau of Prisons, the Drug Enforcement Agency, the Federal Bureau of Investigation, the Immigration and Naturalization Service, the Customs Service, the Bureau of Alcohol, Tobacco, and Firearms, and the Secret Service. Supplemental Appropriations Act of 1987, Pub.L. No. 100-71, § 503, 101 Stat. 391, 468-71; *see* Wash. Post., Sept. 11, 1987, at A1, col. 5, A18, col. 6. The Department of Transportation began random testing of half of its 60,000 civilian employees on September 10, 1987. A court challenge to the testing program was rejected. *American Federation of Government Employees v. Dole*, 660 F.Supp. 445 (D.D.C.1987), *appeal docketed*, No. 87-5417 (D.C.Cir. Dec. 11, 1987). The Department of Justice is preparing to test up to 60,000 of its employees.[8]

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[8] Time Magazine, Nov. 16, 1987, at 18. Random urinalysis testing in the Department of the Army has been limited to "critical" employees under the terms of Department of Defense Directive 1010.9. About 9,400 of the 450,000 civilian employees of the Department of the Army hold "critical" jobs. It seems likely, in light of the Department of Transportation and Department of Justice testing programs, that more civilian employees of the Department of the Army would have been tested had the program been designed pursuant to Executive Order No. 12,564, which calls for testing of employees in "sensitive"

(Continued on following page)

After a series of delays, government-wide random drug testing of federal workers in "sensitive" positions could go into effect as early as May.[9]

C. Interim Change I11 to Army Regulation 600-85

On February 10, 1986, the Department of the Army promulgated regulations implementing Department of Defense Directive 1010.9. Army Regulation 600-85, Interim Change No. I11 (Feb. 10, 1986). Interim Change No. I11 amends the existing Army Regulation 600-85 to include drug testing of civilians. It requires employees in critical jobs, as well as applicants for those jobs, to sign DA Form 5019-R, titled "Condition of Employment for Certain Civilian Positions Identified as Critical Under the Drug Abuse Testing Program." Form 5019-R states:

(Continued from previous page)

positions, 3 C.F.R. 224, 226 (1987). Executive Order No. 12,564 leaves it to the head of each agency to determine which positions are "sensitive." *Id.* Common sense suggests that more federal employees hold "sensitive" positions than "critical" positions, and the Justice Department program appears to confirm this. For example, the Justice Department plans to test "people who have authority of one sort or another to make settlements involving large amounts of money, and those with security clearances." Marcus, *Justice Department vs. Its Lawyers? Group of Government Attorneys Considers Suing Over Drug Tests*, Wash. Post, November 13, 1987, at A21, col. 3 (statement of Justice Department spokesman Patrick S. Korten).

[9] *Results Show Federal Drug Testing Not Fail-Safe*, Wash. Post, Feb. 21, 1988, at A1, col. 2.

SECTION A – REQUIREMENTS

As a prospective or current employee in a position designated by the Department of the Army and approved by the Office of the Secretary of Defense as critical to national or internal security or to the protection of persons or property, you are required to read and sign this statement as a condition of employment. If you are an applicant for a critical job and fail to sign this agreement, you will not be selected for the position. If you are currently in a critical job and refuse to sign the condition of employment, you will be voluntarily or involuntarily reassigned or demoted to a noncritical job or separated from Federal employment. If you sign the condition and later refuse to submit to urinalysis testing, you will be non-selected, reassigned, demoted, or separated according to applicable regulations. To verify that you are not currently using drugs, you will be required, as a condition of your continued employment, to submit a urine sample for testing purposes; (1) periodically, on an unannounced basis, (2) when there is probable cause to believe that you are under the influence of drugs, and/or (3) when there is a mishap or safety investigation being conducted in relation to an accident involving government-owned vehicles, aircraft, or equipment. To assure the validity of these tests, a staff member of the same sex will observe you while you are providing the sample. Detection of drug usage through confirmed positive urinalysis test results may be cause for a determination that you have failed to meet the conditions necessary for your continued employment in the position. Medically prescribed drugs authorized by a physician and confirmed by appropriate evidence are excluded from such determinations. The results of urinalysis will be used only for clinical and necessary administrative purposes.

You are entitled to any additional and reasonable information or clarification you desire prior to signing the agreement. A copy of the signed agreement will be give to you and your supervisor. The original will be placed in your Official Personnel Folder.

SECTION B – AGREEMENT

This is to certify that I understand the contents of the policy described above and the reasons therefor, and that I agree to adhere to the terms of this policy as a continuing condition of my employment in positions to which this agreement applies.

Interim Change No. I11 states that at least 90 days before the initial urinalysis test, each employee holding a critical job must be informed of the reasons for the test and the consequences of failing the test or refusing to take it, including "adverse action." Additionally, employees must be told that they may submit supplemental medical documentation concerning the legitimate use of drugs, and that drug abuse counseling and referral services are available.

The regulation permitted "field testing" of urine samples but specified that positive results from field tests of current employees would be considered preliminary until confirmed by subsequent laboratory testing or an admission of the employee. Only "temporary" personnel action may be taken on the basis of a positive result from a field test. The action must be rescinded if the test result is not confirmed by laboratory testing or an admission of the employee.

The regulation gives broad discretion to unit commanders to decide whom to test:

> The decision to require an individual covered by the biochemical testing program to undergo such testing to detect drug abuse is the commander's prerogative. The management of available quotas, both for field and laboratory tests, is the commander's responsibility. He or she must decide which segments of the total population, civilian and military, are most at risk and allocate quotas accordingly. Beyond the pre-accession test for civilian employees in critical positions, subsequent testing is left to the commander's discretion.

Interim Change No. I11 listed five categories of jobs designated as "critical" and subject to urinalysis testing:

1) Aviation positions: air traffic controller, pilot, aircraft engine mechanic aircraft overhaul specialist, prop and motor mechanic, aircraft mechanic, and aircraft servicer.

2) Guard and police positions: guard, police officer, criminal investigator, and correctional officer.

3) Personnel Reliability Program personnel: chemical and nuclear surety positions.

4) Alcohol and Drug Abuse Prevention and Control Program direct service staff.

5) All employees at Army forensic drug testing laboratories.

Defendants estimate a total of 9,400 of the Army's nearly 450,000 civilian employees are subject to random drug testing, as follows: 2,800 in aviation positions; 3,700 in guard and police positions; 2,250 in the Personnel

Reliability Program; and 650 in drug abuse and drug testing positions.

According to Raymond J. Sumser, the Army's Director of Civilian Personnel, a total of 65 job classes covering 20,000 employees were nominated by unit commanders as "critical" for purposes of drug testing. The Department of Defense reviewed the nominations and approved 16 job classes covering 9,400 employees as "critical" within the meaning of Department of Defense Directive 1010.9.

Sumser's declaration of August 20, 1987, offered explanations of why each position was selected for the Civilian Employees Drug Abuse Testing Program:

> Air traffic controllers – Air traffic controllers provide information to pilots concerning weather, air navigation, and airfield conditions before and during flight. They provide information to pilots in distress, orient lost pilots, and initiate search and rescue action to locate overdue aircraft; control aircraft en route and near airfields to assure proper separation between aircraft and minimize delays caused by congestion. According to Sumser, air traffic controllers must have the ability to act decisively under stressful situations and maintain alertness over sustained periods of pressure. Controllers must be able to coordinate plans and actions and direct aircraft operating at very high speeds and exercise sound judgment to select and take the safest and most effective courses of action among several available choices."
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> Pilots – Pilots, of course, fly aircraft; civilian pilots employed by the Army are responsible for transporting passengers and cargo, including weapons, munitions, and other hazardous materials. "Performance of duties requires extreme

precision in taxiing, taking off, climbing, hovering, approaching, and landing using visual and instrument controls. In flight, pilots must closely monitor sophisticated hydraulic, electrical, pressurization, navigation, and communications systems, space patterns, and fuel consumption."

Aircraft mechanics – Aircraft mechanics inspect, adjust, and repair aircraft systems, assemblies, and surfaces. "Duties require visual checks of components, parts, and systems to determine the need for repair or replacement of parts and the extent of adjustment and alignment required, as well as skills in the use of fixtures, templates, precision dial and feeder gauges, test stands, and cockpit instruments."

Aircraft attendants – Aircraft attendants meet and guide aircraft to parking areas, secure aircraft with wheel chocks, ground wires, lock pins, and engine covers, refuel aircraft, operate ground support equipment such as auxiliary power units, and service aircraft with oil, hydraulic fluid, compressed air, nitrogen, and liquid oxygen. "Aircraft attendants must be skilled in safe work procedures involving hazardous operations such as engine starts and shutdowns and refueling aircraft while engineers are operating ('hot' refuels). Attendants must exercise care to ensure that fuel, hydraulic fluid, engine oil, and other vital fluids replenished during servicing procedures meet the exact technical specifications for the various types of aircraft being serviced."

Sumser stated that the duties of aviation personnel require "keen sensory perception and neuromuscular coordination. Drug use could easily have an adverse impact on these faculties and increase the potential for undue distractions, carelessness, and accidents. . . . Even

slight impairment could reduce the ability of an employee occupying one of these positions to recognize and react to potentially threatening circumstances and materially lessen the chance of preventing accidents." He concluded that drug use by these employees could result in "disruption of operations, damage or destruction of extremely high-value equipment, personal injury, and loss of life."

It is apparent from the Army's rationale for testing these aviation employees that the government's interest is safety and its safety concern is identifying employees who are impaired by drugs on duty.

The next category of "critical" positions is law enforcement. Sumser stated that civilian guards and police employed by the Department of the Army perform typical law enforcement duties and are responsible as well for the protection of Army installations from the hazards of espionage, sabotage, fire, theft, and accidental or willful damage or destruction. Frequently this property includes very dangerous weapons and facilities, including nuclear and chemical, munitions, and electronics and communications systems of vital importance. Additionally, these employees perform courier duties or otherwise have access to classified information. Most guards are required to possess at least a "secret" security clearance. On-duty security personnel are armed, some with automatic weapons, and are authorized to use deadly force in certain circumstances. Their duties include enforcement of drug laws. "Obviously, great doubt is cast on the ability of a law enforcement official who personally uses illegal substances to perform required drug suppression duties."

Some law enforcement officials must perform their duties in relative isolation, "without close and continuous supervision," Sumser stated. "These employees must, at all times, be able to think rationally and respond intelligently despite adverse circumstances and deal effectively in interpersonal confrontations. The inability to fully perform their duties due to drug use could readily create the possibility of theft, security breakdown, damage to or destruction of sensitive government property, personal injury to self and others, and loss of life."

From this rationale for testing civilian law enforcement employees, it is possible to identify three government interests. The first is safety, and again the government's safety concern is identifying employees who are impaired by drugs on duty. The second concern is security, and the government's security concern is identifying employees who use drugs on duty, or off duty because of the possibility of "drug-related blackmail." The third concern might be labeled integrity, and this concern is identifying employees who use drugs either on duty or off duty.

Third, employees who receive special access certifications as part of the Army's Personnel Reliability Program (PRP) are automatically subject to drug testing. These jobs include supervisory personnel who administer the Personnel Reliability Program, nuclear reactor operators, nuclear weapons technicians, chemical ammunition maintenance specialists, quality assurance personnel, materiel handlers, laboratory workers, and intrusion detection system maintenance personnel. Additionally, "other employees who require routine access to surety material or require routine entry into chemical or nuclear exclusion areas" are included; for example, a secretary might be included in the Personnel Reliability Program not because of his or her duties

but because the workplace was within a secured area.

"Personnel occupying PRP positions are responsible for the custody, transportation, storage, maintenance, demilitarization, and security of nuclear and chemical surety materials. Failure to perform these responsibilities increases the risk of untoward incidents, unnecessary costs, and unsafe work environments. This could lead to the definite potential for unthinkable danger to the public, destruction of property, mission degradation, and major security problems. Drug abuse by personnel in these jobs poses a serious threat to the individual, fellow workers, and the surrounding community. Disruption of operations critical to national defense readiness, destruction of property, injury to persons, and disclosure of highly classified information could occur."

The first rationale for drug testing of PRP employees is safety, and the government's safety interest is identifying employees impaired by drugs on duty. The second interest is security, which is served by identifying employees using drugs on duty or off duty.

Finally, civilian employees involved in drug and alcohol counseling, employees in the chain of custody of samples taken for testing, and employees of Army drug testing laboratories are subject to urinalysis drug testing. "Obviously, testing of these personnel is essential to the continued creditility and integrity of ADAPCP [Alcohol and Drug Abuse Prevention and Control Program] and the Army's biochemical testing program. If ADAPCP staff are to function properly in assisting with identification and treatment of military and other civilian personnel with substance abuse problems, they must be certifiably drug free."

The rationale for testing these employees is integrity, which is served by identifying those who use drugs on duty or off duty.

Sumser's declaration makes clear that jobs were designated as "critical" (and therefore subject to drug testing) solely on the basis of their duties and the safety, security, and integrity interests implicated. The designations were not based on drug-related problems that had arisen among particular employees or any suspicion concerning drug use by a group of employees. For example, the defendants cite no examples of "drug-related blackmail," though reference is made to it in Directive 1010.9 and the defendants' pleadings.

D. Changes in Interim Change No. I11

The Army made two significant changes in its civilian drug testing program after the issuance of Interim Change No. I11 on February 10, 1986. The first followed Executive Order No. 12,564's requirement that "[p]rocedures for providing urine specimens must allow individual privacy, unless the agency has reason to believe that a particular individual may alter or substitute the specimen to be provided." 3 C.F.R. 224, 226-27 (1987). On October 10, 1986, the Pentagon established procedures conforming to the presidential order and notified unit commanders as follows:

> A. Biochemical testing will be done with maximum respect and concern for human dignity.
>
> B. The term "biochemical test monitor (BTM) will be used instead of "observer" for the purpose of the civilian urinalysis program. The BTM has the responsibility to ensure that the

sample is not contaminated or altered in any way.

C. Care must be taken to ensure that the individual cannot access a container previously filled with a foreign substance or a prepared sample. For example, employees/applicants should not be allowed to carry such items as briefcases, carry bags, or purses into the collection area, coats for all employees/applicants should be left outside, sleeves should be rolled up, and a visual check of potential hiding places in the stall or collection area should be made prior to giving the employees/applicants the collection bottle.

D. Individual privacy shall be assured by permitting employees or applicants to produce urine specimens alone in closed stalls or other similar structures or enclosures. There will be no observation of any employee's or applicant's private anatomy. The BTM will maintain control of the integrity of the specimen by listening for normal sounds associated with urination and by oversight of the setting.

E. When the bottle is returned to the BTM, he or she will verify the normal warmth and appearance of the sample.

F. If at any time during the testing procedure the BTM has reason to believe or suspect that an employee or applicant is attempting to adulterate or substitute the sample, he or she should stop the procedure and inform the installation biochemical testing coordinator (IBTC) of that individual's conduct. The IBTC will then determine if direct observation is required. . . .

On March 19, 1987, the Pentagon revoked the authorization for field testing of urine samples of employees. It ordered that "[all] samples of civilian employees will now

be forwarded directly to the forensic toxicology drug testing laboratory (FTDTL) for testing." The sole exception permitting continued use of field testing as a prescreen is for persons selected for critical positions; a positive result would delay hiring until the laboratory test was conducted. The field testing used by the Army was the Enzyme Multiplied Immunoassay Technique (EMIT) System, marketed by Syva Company. The Army laboratories use a radioimmunoassay (RIA) test and a gas chromatography/mass spectromentry (GG/MS) test, which is considered the most reliable and acceptable method of testing for drugs or drug metabolites.

E. Uses of Drug Test Results

The Army considers its civilian drug testing program "non-punitive and non-disciplinary in nature," in the words of Samuel S. Horn, Deputy Chief of the Labor and Civilian Personnel Law Office, Office of the Judge Advocate General Department of the Army. Nonetheless, failure to take the test or a positive result could result in dismissal.

Horn explained in an August 11, 1987, declaration that a current employee in a critical position who does not want to be subject to drug testing could request reassignment to a noncritical position for which he or she was qualified. "If there is no noncritical job available at the same grade level, the employee may be offered a job at a lower grade level. In the event there is no alternative noncritical position available into which the employee may be assigned, the employee may be separated from the service."

Nor does a positive urinalysis result in automatic dismissal, although dismissal may result. An employee will be offered drug counseling or treatment and will be "reassigned to an available noncritical position for which he or she is qualified, with no loss of pay or benefits. If no noncritical positions are available at the same grade level, the employee will be offered a position at a lower grade if such a position is available. Only if no alternative noncritical positions are available will the employee be separated for failure to meet a condition of employment."

Horn also stated that employees who successfully complete a treatment and rehabilitation program are eligible to return to their former jobs. The report for the six-month period ending March 31, 1987, attached to Horn's declaration, shows that of the 37 employees who tested positive, four resigned; five employees were fired, two because of a "second positive," two for "other reasons," and one who was a temporary employee; the other 28 employees were detailed or reassigned, with 14 still in rehabilitation, eight refusing rehabilitation, and six successfully rehabilitated and returned to a critical job.

F. Army Test Procedures

The Army has abandoned EMIT field testing of urine samples of current employees, and instead relies on a two-tier laboratory testing procedure. Lieutenant Colonel John S. Jewell, who holds a Ph.D. in organic chemistry and serves as consultant to the Surgeon General of the Army for drug laboratory operations, said in an August 10, 1987, declaration that the initial test used by all military laboratories is the radioimmunoassay (RIA) test, which is based on immunological principles. If the RIA

test is positive, a gas chromatography/mass spectrometry (GS/MS) test is conducted. A positive result is issued only after both tests have confirmed the presence of the drug or drug metabolite above an administratively defined cutoff level. The administrative cutoff level is designed to screen out positive results that could be associated with passive inhalation or "non-participative ingestion" of drugs.

Jewell offered this explanation of how the tests work:

> The RIA procedure (Abuscreen) is based on a physical reaction between antibodies (substances manufactured in the bodies of animals or humans to assist the bodies' elimination and/or detoxification of these substances) and antigens (drugs) that cause physical separation of these substances from urine. The end point consists of measuring a decrease in the radioactivity found as a result of competitive binding reactions between naturally occurring drugs and drugs modified with radioactive Iodine-125. The RIA procedure correctly identifies the presence of drug or drug metabolites greater than 99% of the time.
>
> [] The GC/MS procedure combines both the physical and chemical properties of the molecule to be identified with the analytical capabilities of the instrument. The first part of the procedure relies on the physical and chemical properties of the drug or drug metabolite to separate them from the urine matrix. Then the drug or drug metabolite is usually taken through a chemical derivitization that makes use of the chemical properties of the compound to separate it from other molecules of different chemical structure. Then the derivatized drug or drug metabolite of interest is separated from all other molecules by its physical properties using

> gas chromatography and an absolute identification is made through a mass spectrometer fragmentation pattern. This procedure is recognized as the state-of-the-art method and is 100% accurate for chemical, drug or drug metabolite identification. The GC/MS identification has been accepted by the scientific community as being the most reliable and acceptable method for drug or drug metabolite identification.

The tests detect the presence of drugs in some cases, drug metabolites in other. A drug metabolite is an inactive product resulting from the body's breakdown of a drug. Cocaine is generally detected by its metabolite, benzoylecgonine; the active ingredient of marijuana, delta-9-tetrahydrocannabinol (THC), is also detected by its metabolites, principally THC-9-carboxylic acid (THC-acid). Morphine, phencyclidine (PCP), amphetamines, barbiturates, and LSD are excreted directly into the urine. Declaration of Robert E. Willette, Ph.D., June 3, 1987.

Even "state-of-the-art" tests have sever limitations; for example, defendants' counsel informed the Court that the Army no longer tests civilians for opiates because consumption of a quantity of poppy seeds before testing produces a "false positive" test result for opiates. In other words, the most technologically advanced urine test cannot distinguish between a heroin user and a person who eats poppy seed strudel.

More importantly, it is beyond dispute that urinalysis drug testing, whether by the EMIT method, the RIA method, or the GS/MS method, is not capable of determining whether a person is impaired or intoxicated by drugs. Courts focusing on the issue have agreed that

urinalysis cannot show impairment,[10] and government counsel have conceded the point at oral argument and in their pleadings and submissions. Willette provides one reason for this incontrovertible fact: "Unfortunately, the relationship between concentrations of certain drug metabolites in urine and their parent drugs in the body is obscured by fluctuations in urine flow, sometimes in differences in metabolic rates, and other individual characteristics." Only a blood test can show a correlation between the effects of drugs and their concentrations in

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[10] *E.g., Railway Labor Executives' Association v. Burnley*, 839 F.2d 575, 588 (9th Cir.1988) ("tests cannot measure current drug intoxication or degree of impairment"); *Jones v. McKenzie*, 833 F.2d 335, 339 & n. 10 (D.C.Cir.1987) (trial court found, and defendant conceded, tests did not show whether user is under influence at time of test); *Schaill v. Tippecanoe County School Corp.*, 679 F.Supp. 833, 857 (N.D.Ind.1988) (witnesses testify without contradiction, and court concludes, that "little, if anything, can be inferred relative to current impairment" from urinalysis testing) (1988 WL 7127); *Taylor v. O'Grady*, 669 F.Supp. 1422, 1431 (N.D.Ill.1987) ("I find that there is no substantial relationship between a positive urine test and an impairment at the time of testing"); *Anable v. Ford*, 663 F.Supp. 149, 153 (W.D.Ark.1985) ("The utmost that the most precise of urine tests can reveal is that a student has ingested marijuana at some time in the preceding days or weeks."). *See also* Dubowski, *Drug-Use Testing: Scientific Perspectives*, 11 Nova L.Rev. 415 (1987); Hudner, *Urine Testing for Drugs*, 11 Nova L.Rev. 553, 556-57 (1987); Joseph, *Fourth Amendment Implications of Public Sector Work Place Drug Testing*, 11 Nova. L.Rev. 605, 632 (1987). *But see American Federation of Government Employees v. Dole* 670 F.Supp. 445, 448 (D.D.C.1987) (discussed *infra* note 12), *appeal docketed*, No. 87-5417 (D.C.Cir. Dec. 11, 1987).

bodily fluids.[11] As the testing technology now stands, tests for only one substance can show impairment; that substance is alcohol.

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[11] The experts are in considerable disarray on the so-called "hangover effects" of various drugs. However, in the face of criticism from plaintiffs' experts, the defendants' experts appear to be in retreat on the subject. For example, in a supplemental declaration dated August 28, 1987, J. Michael Walsh, Ph.D., Director of Workplace Initiatives, National Institute on Drug Abuse, stated that "the fact is that *there are very few studies that look beyond the acute affects of drugs*, i.e., the direct pharmacological effects of drugs in the first three to four hours after the drug is ingested."

Marian W. Fischman, Ph.D., Associate Professor in the Department of Psychiatry and Behavioral Sciences at Johns Hopkins University School of Medicine, filed a supplemental declaration dated August 27, 1987, to respond to criticism of one of his earlier assertions. "The quoted sentence, 'Hangover effects after marijuana smoking may represent an additional, heretofore unappreciated aspect of marijuana toxicity,' was carefully worded to include *may*," Fischman stated. "The data collected were *suggestive* of such residual effects, not conclusive, as no single study of this sort can be conclusive. The point of carrying out these kinds of research studies is to accumulate sufficient evidence pointing in one direction to be able to draw a conclusion. . . . [A] substantial body of literature in support of residual drug effects does not currently exist. . . ."

The Court, of course, cannot resolve this dispute among scientists. To the extent that a "clear" relationship, *see Jones v. McKenzie*, 833 F.2d 335, 336 (D.C.Cir.1987), must be established between testing and impairment, however, the Court finds that the government has failed at this juncture in the case to make this showing. Even the government's experts conceded the verdict is not in on hangover effects.

The National Institute on Drug Abuse of the U.S. Department of Health and Human Services states flatly that urinalysis testing can detect only prior drug use, not present impairment. "Although urine screening technology is effective in determining prior drug use, positive results of a urine screen do not prove intoxication or impaired performance. Drugs or their methabolites may appear in urine for several days, even weeks (depending upon the drug), without apparent impairment." National Institute on Drug Abuse, *Consensus Summary: Interdisciplinary Approaches to the Problem of Drug Abuse in the Workplace* 6 (1986)[12].

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[12] The Court takes note of Judge Gesell's statement that the Department of Transportation "presented proof that drug use, at the level sought by testing generally impairs the normal functioning of employees." *American Federation of Government Employees v. Dole*, 670 F.Supp. 445, 448 (D.D.C.1987), *appeal docketed*, No. 87-5417 (D.C.Cir. Dec. 11, 1987). The Court has examined the defendant's papers in that case without finding evidence that a positive test shows on-duty impairment. For example, the defendant states, "A confirmed positive urinalysis test result that has been verified by the agency's medical review officer (MRO) demonstrates that the employee is an illegal drug user, and presents the government with the substantial risk that the employee is currently impaired or will in the future be impaired while on duty." Defendant's Memorandum of Law in Opposition to Plaintiffs' Motion for a Preliminary Injunction, and Reply Memorandum in Support of Defendant's Motion for Summary Judgment at

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G. Alternative to Urinalysis

Defendants have presented no evidence that alternative methods of detecting drug use have been seriously

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14-15, *American Federation of Government Employees, v. Dole*, 670 F.Supp. 447 (D.D.C.1987), *notice of appeal filed*, No. 87-1815 (Nov. 25, 1987). The passage quoted above contains a footnote, which states: "Plaintiffs repeatedly complain that the drug tests do not measure impairment and are therefore worthless. *See* McBay Dec. at ¶12. Defendants agree that drug tests do not *measure* impairment in the sense that, for example, a breathalyzer test measures alcohol impairment; differences in individual metabolic rates make it difficult to draw definite conclusions about the exact relationship between the presence of drug metabolites in the urine and the presence of such metabolites in the body. However, a drug test that uses a high cut-off level like the DOT plan does demonstrate that the person tested ingested an illegal drug very recently. Willette Dec. at ¶12; Jewell Dec. at ¶3." *Id.* at 15 n. 8.

The two declarations cited fail to support the contention that the cut-off levels used by the government demonstrate "very recent[]" drug use. One states that marijuana metabolites fall below cut-off values within two to five days for infrequent users, and adds, "The quantity of cannabinoid metabolites in urine depends primarily on the quantity of liquids ingested prior to the time of sampling." The other states that smoking a single marijuana cigarette can be detected "for two or three days."

Another government expert, J. Michael Walsh, Ph.D., Director of Workplace Initiatives for the National Institute on Drug Abuse, reported in an August, 11, 1987, declaration in the case *sub judice* that studies show that any measurable effects caused by marijuana end long before the ability of testing to detect metabolites of the drug in urine.

considered or attempted. Defendants merely note that the nature of some jobs makes close supervision difficult because the employees often work alone. They also point out that drug tests result in some positive results when a trained observer would detect no impairment; in light of the foregoing that is both not surprising and not supportive of the government's position. Executive Order No. 12,564 requires that each agency's drug testing plan include "[s]upervisory training to assist in identifying and addressing illegal drug use by agency employees." 3 C.F.R. 224, 226 (1987). However, this requirement is not incorporated in Department of Defense Directive 1010.9 or Interim Change I11 to Army Regulation 600-85.

Alternative methods of detecting drug use by employees are suggested by the plaintiffs, and criticized by the defendants, in the pleadings before the Court. The Court also finds helpful Judge Getzendanner's discussion of alternative methods of detection in *Taylor v. O'Grady*, 669 F.Supp 1422, 1431-33 (N.D.Ill.1987) (enjoining compulsory urine testing of county correctional officers).

The first alternative is observation by trained supervisors, which can detect chronic drug and some on-duty drug use; it cannot detect off-duty use that does not manifest itself on the job. The second alternative is neurobehavioral testing, or testing the behavioral output of the brain to determine whether a worker's thinking or behavioral processes are impaired. There is no evidence in the record before the Court that defendants have seriously considered either alternative.

III. Conclusions of Law

Plaintiffs raise a number of constitutional and statutory issues in addition to their main challenge under the Fourth Amendment. The Court finds it unnessary to address those issues at this juncture because Fourth Amendment considerations entitle plaintiffs to injunctive relief.

A. General Fourth Amendment Principles

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

It restricts the activities of civilian authorities as well as law enforcement officers, *New Jersey v. T.L.O.*, 469 U.S. 325, 335-37, 105 S.Ct. 733, 740-41, 83 L.Ed.2d 720 (1985), and applies to the conduct of governmental employers. *O'Connor v. Ortega*, ___ U.S. ___ , 107 S.Ct. 1492, 1497, 94 L.Ed.2d 714 (1987) (plurality opinion).

The Fourth Amendment does not restrict all searches and seizures by the government, but it does prohibit all *unreasonable* searches and seizures. Fourth Amendment analysis proceeds in two steps. First, the Court must determine whether the government's conduct constitutes a search or seizure by infringing upon a reasonable expectation of privacy. Compulsory urinalysis of public employees is a "search and seizure" in this Circuit. *Jones v. McKenzie*, 833 F.2d 335, 338 (D.C.Cir.1987); *National*

Federation of Federal Employees v. Weinberger, 818 F.2d 935, 942 (D.C.Cir.1987) (NFFE). Second, if a search or seizure occurred, the Court must determine whether it was reasonable.

The interest served by the Fourth Amendment is the protection of the "privacy and security of individuals against arbitrary invasions by government officials." *Camara v. Municipal Court*, 387 U.S. 523, 528, 87 S.Ct. 1727, 1730, 18 L.Ed.2d 930 (1967). To safeguard this interest, "one governing principle, justified by history and by current experience, has consistently been followed: except in certain carefully defined classes of cases, a search of private properly without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." *Id.* at 528-29, 87 S.Ct. at 1730-31. Even where warrantless searches are permitted, they ordinarily "must be based upon 'probable cause' to believe that a violation of the law has occurred." *T.L.O.*, 469 U.S. at 340, 105 S.Ct. at 743.

However, neither a warrant nor probable cause is an irreducible requirement of a valid search and seizure. "The fundamental command of the Fourth Amendment is that the searches and seizures be reasonable, and although 'both the concept of probable cause and the requirement of a warrant bear on the reasonableness of a search, . . . in certain limited circumstances neither is required.'" *Id.* at 340, 105 S.Ct. at 743 (quoting *Almeida Sanchez v. United States*, 413 U.S. 266, 277, 93 S.Ct. 2535, 2541, 37 L.Ed.2d 596 (1973) (Powell, J., concurring)).

There are even some rare circumstances where individualized suspicion is not necessary to validate a search.

T.L.O., 469 U.S. at 342 n. 8, 105 S.Ct. at 744 n. 8. Nevertheless, "some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure," *id.* (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 560-61, 96 S.Ct. 3074, 3084, 49 L.Ed.2d 1116 (1976)), and "[e]xceptions to the requirement of individualized suspicion are generally appropriate only where the privacy interests implicated by a search are minimal. . . ." *T.L.O.*, 469 U.S. at 342 n. 8, 105 S.Ct. at 744 n. 8.

Because the privacy intrusion represented by urinalysis is not "minimal," *Jones v. McKenzie*, 833 F.2d at 339 ("strong privacy interests are involved"), the Fourth Amendment requires a heavy presumption against searches not based on individualized suspicion.[13] Only a compelling need of the government as employer could justify dispensing with the requirement of individualized suspicion. Random testing, of course, is based on no suspicion whatsoever, and there exist no grounds at all for suspecting that the search represented by urinalysis will turn up evidence. Indeed, the government's goal is to obtain no positive results.

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[13] The Court does not believe the "heavily regulated industries" exception to the warrant requirement, *New York v. Burger*, ___ U.S.___, 107 S.Ct. 2636, 96 L.Ed.2d 601 (1987); *Donovan v. Dewey*, 452 U.S. 594, 101 S.Ct. 2534, 69 L.Ed.2d 262 (1981); *United States v. Biswell*, 406 U.S. 311 (1972); *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 90 S.Ct. 774, 25 L.Ed.2d 60 (1970), is applicable to this case. The third Circuit's decision in *Shoemaker v. Handel*, 795 F.2d 1136 (3d Cir.), *cert. denied*, ___ U.S.___, 107 S.Ct. 577, 93 L.Ed.2d 580 (1986), which

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The Supreme Court has been guided by a twofold inquiry in determining whether a search without a warrant or probable cause is reasonable: "first, one must consider 'whether the . . . action was justified at its inception.' *Terry v. Ohio*, 392 U.S. [1], 20 [88 S.Ct. 1868, 1879, 20 L.Ed.2d 889] [(1968)]; second, one must determine whether the search as actually conducted 'was reasonably related in scope to the circumstances which justified the interference in the first place,' *ibid.*" *T.L.O.*, 469 U.S. at 341, 105 S.Ct. at 744.

This requirement that both the inception and scope of the intrusion be reasonable applies to the government workplace. *O'Connor v. Ortega*, 107 S.Ct. at 1502-03. Determining the "standard of reasonableness applicable to a particular class of searches requires 'balanc[ing] the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of

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held the exception applies to warrantless breath and urine testing of jockeys "in the heavy regulated horse-racing industry," 795 F.2d at 1142, is readily distinguishable. Unlike jockeys, the federal employees in this case are not members of a "highly regulated industry" subject to licensing requirements and a comprehensive regulatory scheme diminishing their privacy expectations. The Eighth Circuit's extension of the heavily regulated industries exception in *McDonell v. Hunter*, 809 F.2d 1302, 1308 (8th Cir.1987), is likewise distinguishable. The Eight Circuit limited its holding to prison guards "who have regular contact with the prisoners on a day-to-day basis in medium or maximum security prisons." The court was unwilling to extend across-the-board testing even to other prison employees not falling within this select group. *Id.* The narrowness of the holding in *McDonell v. Hunter* distinguishes it from this one.

the governmental interests alleged to justify the intrusion.'" *Id.* at 1499 (quoting *United States v. Place*, 462 U.S. 696, 703, 103 S.Ct. 2637, 2642, 77 L.Ed.2d 110 (1983)).

The D.C. Circuit elaborated on this inquiry in the context of compulsory urinalysis in *NFFE*:

> On the one side of this balance, in the matter at hand, are the employees' reasonable expectations of privacy – those expectations which society is "prepared to recognize as legitimate." On the other side of the balance is "[t]he governmental interest [in] the efficient and proper operation of the workplace." This balancing inquiry has two reference points: the court must determine first "whether the [search] was justified at its inception" – *i.e.*, whether "reasonable grounds [exist] for suspecting that the search will turn up evidence" of work-related drug use; *and* second, "whether the search as actually conducted 'was reasonably related in scope to the circumstances which justified the interference in the first place,'" – *i.e.*, whether "the measures adopted are reasonably related to the objectives of the search and not excessively intrusive."

NFFE, 818 F.2d at 942-43 (citations omitted).[14]

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[14] The Fifth Circuit applied a somewhat different analysis in *National Treasury Employees Union v. Von Raab*, 816 F.2d 170 (5th Cir. 1987), *cert. granted*, ___ U.S. ___ , 108 S.Ct. 1072, 99 L.Ed.2d 232 (1988). The Fifth Circuit upheld a testing program for some Customs Service employees tentatively selected for transfer into a sensitive position. The testing is not random, but is a regular element of the required procedure for transferring into certain jobs. 816 F.2d at 173. Additionally, the integrity interest articulated by the government is more compelling

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B. *Jones v. McKenzie*

The D.C. Circuit, again speaking through Judge Edwards, revisited drug testing of public employees recently in *Jones v. McKenzie*, 833 F.2d 335 (D.C.Cir.1987). While the factual situation was somewhat different, the case has elements in common with the case *sub judice*. *Jones v. McKenzie* involved drug testing in the context of a regular medical examination, not random testing, of school bus drivers, mechanics, and attendants employed by the District of Columbia Public School System. The testing program arose from a perceived "drug culture" among the employees, and the record contained repeated incidents of "bizarre or dangerous drug-related behavior by drivers and attendants while on duty." *Id.* at 336. Syringes and bloody needles were found in restrooms, and the head of the Transportation Branch estimated 60 percent of the employees were using narcotics. In response to this perceived problem, the School System decided to include drug testing in its medical examinations, and so notified the employees. *Id.* at 336-37.

The purpose of the tests was to enforce a long-standing directive prohibiting employees "to possess, use or be

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in the case of the Customs Service, which is charged with a key role in interdicting illegal drug smuggling, than in the case of civilian employees of the Army. The *Von Raab* decision also has been criticized for failing to adequately identify employee interests to be balanced against the government interest. *E.g.*, *Feliciano v. City of Cleveland*, 661 F.Supp 578, 592 (N.D.Ohio 1987).

under the influences of intoxicating liquors, narcotics, or other drugs such as LSD, marijuana and the like, while on school premises." *Id.* at 337. Employees were required as part of medical examinations to provide urine specimens in the privacy of a restroom. The samples were tested with the EMIT Cannabinoid Urine Assay. An employ who was fired after a positive test for THC metabolities filed suit in district court. The court held the testing was an unreasonable search "in the absence of particularized probable cause." *Jones v. McKenzie,* 628 F.Supp. 1500 (D.D.C.1986) (order).

The Court of Appeals reversed as to the requirement of "probable cause," holding that testing could be required when safety interests were high, the testing was part of a routine, employment-related medical examination, and "the test employed is one that has a nexus to the employer's legitimate safety concern." *Jones v. McKenzie,* 833 F.2d at 340.

The court found, or rather found the School System had conceded, that the EMIT test used "is not a valid measure of whether the subject is in possession of, is using, or is under the influence of illicit drugs at the time of the test. As this test therefore lacks a sufficient nexus to the appellant's legitimate concern that its employees not possess, use or be under the influence of drugs while on duty, it is clear that the School System could not constitutionally test its employees for drugs *in the manner Jones was tested. . . .* " *Id.* at 339.

The more sophisticated RIA and GS/MS tests used by the Department of the Army are perhaps more reliable than the EMIT test, but they do not reveal any more

information about whether a person is impaired by or under the influence of drugs while on duty. Like the EMIT test, they detect only relatively recent drug use.

C. Application of the Law to This Case

1. *Justified at Inception*

The first prong of the reasonableness test is whether the search is justified at its inception. The government has advanced three interests in compulsory random urinalysis. Only "strong governmental concerns" can outweigh the privacy interests involved here, *Jones v. McKenzie*, 335 F.2d at 340. The first interest is safety, of the workers, the workplace, and the public. This is an important and serious interest. "The case law on this point is clear that a governmental concern is particularly compelling when it involves the physical safety of the employees themselves or others." *Id.* This interest is served by detecting on-duty impairment. At this stage of the scientific development of drug testing, urinalysis testing does not advance this interest because there is no convincing evidence that a positive result can *ipso facto* be equated to on-duty impairment. Off-duty drug use does not automatically mean on-duty impairment any more than off-duty consumption of alcoholic beverages means on-duty impairment.

The second interest is security. This too can be a compelling interest in the context of the nation's defense. The government argues that on-duty drug use could lead to breaches of security directly, and that off-duty drug use could lead to breaches of security because of bribery or blackmail possibilities. No evidence correlating off-

duty drug use to bribery and blackmail has been produced, and on the facts presented to date the Court considers this relationship speculative.[15]

The third interest is integrity. The government argues that those responsible for enforcing the law and conducting the testing program must be "certifiably drug free" if they are to have the respect and confidence of those they police and test, and of the public. Under this rationale all Cabinet officers and the President should undergo random drug testing. The Court finds this interest less compelling than safety and security. The government has presented only supposition but no evidence of any harm that would occur if the personnel were not "certifiably drug free." This interest, of course, would be advanced by testing for any drug use, off-duty as well as on-duty.[16]

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[15] In *Berry v. District of Columbia*, 833 F.2d 1031 1035 (D.C.Cir.1987), the Court of Appeals, again speaking through Judge Edwards, said the trial court could not merely accept the argument that there is a positive correlation between drug use and the likelihood that an arrestee released on bail will commit crimes or fail to appear for court dates. "On remand, the District must proffer reliable evidence, statistical or otherwise, from which the trial court can reasonably conclude that drug use makes is significantly more likely that an arrestee will commit crimes or fail to appear for scheduled court dates." *Id.*

[16] The government also argues that drug use, on duty or off, is "simply incompatible" with federal employment. Concededly, no one should engage in illegal activities, but the government's argument has several flaws. First, it fails to articulate a compelling interest that would justify the substantial intrusion represented by compulsory random urinalysis. Second, if accepted the argument would justify testing of all

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On the issue of whether the search represented by compulsory random urinalysis is "justified at its inception," the Court concludes as follows:

The government's safety interest, where compelling, justifies testing for on-duty impairment. Safety does not justify testing for off-duty drug use because there is insufficient demonstrable effect on work-place safety.

The government's security interest, where compelling, justifies testing for on-duty impairment. Security does not justify testing for off-duty drug use because there is insufficient showing that off-duty drug use is related to security.

The government's interest in integrity as presently articulated as to the job categories under consideration does not justify testing for off-duty drug use because the interest is not sufficiently compelling in the face of the intrusion represented by random urinalysis and because there is insufficient evidence suggesting that employees must be "certifiably drug-free" to perform their duties.

To summarize, compulsory random urinalysis is justified at its inception by compelling safety and security

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federal employees, not only those holding "critical" jobs. Third, as Judge Edenfield noted, the question "is not *whether* drug use, off-duty or on-duty is compatible with federal employment. Rather, the question is *by what means* is it permissible to come by evidence of such drug use." *American Federation of Government Employees v. Weinberger*, 651 F.Supp. 726, 735 (S.D. Ga. 1986).

concerns that would be jeopardized if employees were impaired or under the influence of drugs while on duty. Testing for off-duty drug use is not justified at its inception because the government's interest in integrity, as presented in this record, is not sufficiently compelling and the government's safety and security concerns are not jeopardized by off-duty drug use with no on-duty consequences.

2. *Related in Scope*

The next step in the analysis is to determine "whether the search as actually conducted 'was reasonably related in scope to the circumstances which justified the interference in the first place.'" *T.L.O*, 469 U.S. at 341, 105 S.Ct. at 744 (quoting *Terry v. Ohio*, 392 U.S. at 20, 88 S.Ct. at 1879).

Here, the search as actually conducted is not reasonably related to the justification, in two ways: first, urinalysis is not "reasonably related" to the justification because, as the technology now stands, it fails to show whether an employee is impaired on the job. This is the same conclusion reached by the Ninth Circuit recently in *Railway Labor Executives' Association v. Burnley*, 839 F.2d 575, 588 (9th Cir. 1988). In that case, federal regulations mandating drug tests of employees after certain train accidents were struck down as unreasonable under the Fourth Amendment. The court found suspicionless testing constitutionally infirm because the tests do not detect on-the-job drug use:

> We see one flaw in the reasonableness of this approach to the problem. Blood and urine tests

> intended to establish drug use other than alcohol are not reasonably related to the stated purpose of the tests because the tests cannot measure current drug intoxication or degree of impairment.

Id.

Second, urinalysis is "excessively intrusive" because it reveals information in which the employee has a legitimate expectation of privacy concerning his or her personal life while off-duty.[17] In short, the test employed fails to validly detect the activity with which the government is legitimately concerned.

Whether random urinalysis is "excesively intrusive" turns on whether less intrusive but effective alternatives are available. Both trained supervision and neurobehavioral testing can usually detect those who are impaired at work because of drug use, something urinalysis drug testing cannot do. Thus, to the extent that

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[17] Tests detecting off-duty drug use "provide Government officials with a periscope through which they can peer into an individual's behavior in her private life, even in her own home." *Jones v. McKenzie*, 833 F.2d at 339. This amounts to a form of surveillance of a person's off-duty activities. *Id.* (quoting *Capua v. City of Plainfield*, 643 F.Supp. 1507, 1511 (D.N.J.1986)); *cf. American Federation of Government Employees v. Weinberger*, 651 F.Supp. 726, 733 (S.D.Ga.1986) (urinalysis highly intrusive into "private affairs of an individual"). The information available to government officials from urinalysis is not limited to illegal drug use. For example, secret pregnancy tests were conducted on the urine samples of women who applied to be District of Columbia police offers from November, 1985, until the practice was disclosed recently. *Applicants for D.C. Police Secretly Tested for Pregnancy*, Wash. Post, Nov. 5, 1987, at A1, col 1.

the legitimate government interest is served by detecting on-duty drug use, less intrusive alternatives make random urinalysis excessively intrusive.

It is worth noting that the random urinalysis testing at issue here is more intrusive than the regular or announced testing as part of an employment-related medical examination reviewed in *Jones v. McKenzie*. The only "notice" given of the Army testing program is that an employee is henceforth subject to random, unannounced testing; the employee's only alternative to undergoing testing is giving up the "critical" job. The testing also is more intrusive than that in *Jones v. McKenzie* because it occurs in the work setting, not in a physician's office or other medical facility. While the Army's procedures were changed to provide more privacy in that no visual observation is permitted absent suspicion of tampering, the intrusion can only be minimized, not eliminated. The act of urinating is still "observed" by senses other than sight.

Accordingly, as it now stands absent some scientific advances, urinalysis is both not "reasonably related" to the government's safety interest and is "excessively intrusive," and therefore necessarily violates the Fourth Amendment. Illegal drugs are an enormous and dangerous problem in this country. It is with some regret that the Court removes what might be a powerful weapon from the nation's arsenal in the campaign against illegal drug use, but the values represented by the Constitution and the Fourth Amendment are transcendent.

The Court's analysis has been guided by the teachings of the Supreme Court on general Fourth Amendment

principles and the Court of Appeals for the District of Columbia Circuit on drug testing of public employees. It has striven to be faithful to controlling precedent, even where the Court might have reached a different result were it writing on a blank slate. No attempt has been made to line up the many cases decided by federal and state trial and appellate courts on this difficult subject, first because they are not relevant to the extent that they depart from cases decided by this Circuit, and second because they simply cannot be lined up. Judges across the nation have struggled to balance the public and private interests at stake, often reaching irreconcilable results. The prospect of Supreme Court guidance is a welcome one.

IV. Standards for a Preliminary Injunction

Four factors are to be considered in determining whether a preliminary induction is warranted: 1) the likelihood that the party seeking the preliminary injunction will prevail on the merits; 2) the likelihood that the moving party will be irreparably harmed absent such relief; 3) the prospect that others will be harmed if the court grants a preliminary injunction; and 4) the public interest in granting the relief sought. *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 842-42 & n.1 (D.C.Cir. 1977); *Virginia Petroleum Jobbers v. FPC*, 259 F.2d 921, 925 (D.C.Cir.1958).

Here, the Court finds it likely the plaintiffs will prevail on the merits of their Fourth Amendment claim. The law is well settled that the burden is on the government to show that a warrantless search is reasonable under the

Fourth Amendment. "Those seeking to invoke an exception to the warrant requirement bear the burden of establishing that circumstances required dispensing with that requirement." *United States v. Longmire*, 761 F.2d 411, 417 (7th Cir.1985) (collecting cases); *see also* 4 W. LaFave, *Search and Seizure* § 11.2(b) at 218 (2d ed. 1987) (burden on defendant when attacking search pursuant to warrant; burden on government when warrantless search is attacked). Here, the government has failed to demonstrate that compulsory, random urinalysis is justified at its inception and reasonably related to the objectives and not excessively intrusive.

Without the relief requested, plaintiffs must undergo an unconstitutional search or face transfer, demotion,or even dismissal. No substantial harm to other parties will result from a preliminary injunction because urinalysis drug testing does not detect drug-related impairment on the job and other methods of detecting such impairment are available, Finally, the Court concludes that the public interest lies in enjoining unconstitutional searches.

V. Conclusion

For these reasons, the Court shall preliminarily enjoin the Department of the Army from compulsory random urinalysis of its civilian employees under Army Regulation 600-85. An order consistent with the foregoing accompanies this memorandum opinion.

ORDER

Pursuant to Fed.R.Civ.P. 25(d)(1), it is this 1st day of March, 1988,

ORDERED that Frank C. Carlucci, Secretary of Defense, is substituted as defendant in this consolidated action for Casper Weinberger, who has resigned as Secretary of Defense.

ORDER

Upon consideration of plaintiff's motion for an expanded preliminary injunction, defendants' motion for summary judgment, the oppositions and replies thereto, supporting memoranda, oral argument, and the entire record herein, and for the reasons set forth in the accompanying Memorandum Opinion, it is this 1st day of March, 1988,

ORDERED that defendants are hereby restrained from implementing or enforcing Department of Defense Directive 1010.9 and Interim Change No. I11, amending Army Regulation 660-85 as they pertain to suspicionless drug testing of civilian employees of the Department of the army. Defendants are specifically enjoined from conducting any urinalysis or other drug test unless the test is based upon a reasonable, articulable, and individualized suspicion that a specific employee is under the influence of drugs or alcohol while on duty; and it is

FURTHER ORDERED that security pursuant to Fed.R.Civ.P. 65(c) is set in the amount of $0.00 and no bond need be posted.

APPENDIX G

DEPARTMENT OF DEFENSE DIRECTIVE

April 8, 1985

NUMBER 1010.9

A. *PURPOSE*

This Directive:

1. Authorizes the establishment of the DoD Civilian Employees Drug Abuse Testing Program.

2. Provides policy, prescribes procedures, and assigns responsibilities for drug abuse urinalysis testing for DoD Civilian Employees (hereafter referred to as "employees").

B. *APPLICABILITY*

This Directive applies to the Office of the Secretary of Defense, the Military Departments (including their reserve components), the Organization of the Joint Chiefs of Staff, the Unified and Specified Commands, and the Defense Agencies (hereafter referred to collectively as "DoD Components").

C. *DEFINITIONS*

1. *Confirmed Positive.* Urine sample that has been tested positive under procedures required by this Directive and that has been reported as positive because it meets both initial and confirmatory test levels established under sections E. and F., enclosure 3, of reference (a).

2. *Controlled Substances.* Substances listed in the schedules published under reference (b).

3. *Critical Jobs.* Those jobs or classes of jobs sufficiently critical to the DoD mission or protection of public safety that screening to detect the presence of drugs is warranted as a job-related requirement.

4. *Dod Civilian Employee.* An employee of the Department of Defense who is paid from appropriated or nonappropriated funds.

D. *POLICY*

It is Dodd policy that DoD Components may establish a drug abuse testing program for civilian employees in critical jobs to:

1. Assist in determining fitness for appointment or assignment to, or retention in, a critical job.

2. Identify drug abusers and notify them of the availability of appropriate counseling, referral, rehabilitation, or other medical treatment.

3. Assist in maintaining the national security and the internal security of the Department of Defense by identifying persons whose drug abuse could cause disruption of operations, destruction of property, threats to the safety of themselves and others, or the potential for unwarranted disclosure of classified information through drug-related blackmail.

E. *RESPONSIBILITIES*

1. The *Assistant Secretary of Defense (Health Affairs)* (ASD(HA)) is responsible for the administration of this program.

2. The *Assistant Secretary of Defense (Manpower, Installations, and Logistics)* (ASD(MI&L)) is responsible for the concurrence in the designation of jobs or classes of jobs identified as "critical jobs."

3. *Heads of DoD Components* that intend to institute civilian employee drug abuse testing, an optional program, shall issue implementing documents incorporating the guidelines and procedures set forth in this directive before requesting designation of jobs or classes of jobs as "critical jobs."

F. *PROCEDURES*

1. *Designation of Critical Jobs*

a. DoD Components shall submit 5 copies of requests for designation of jobs or classes of jobs as "critical jobs" to the ASD(HA). The ASD(HA) shall obtain the concurrence of the ASD(MI&L).

b. The request from the DoD Component shall specify the job or classes of jobs, the justification for drug abuse testing of the specific job or class of jobs, the locations in which drug abuse testing is likely to be conducted, and the approximate number of persons within the job or class of jobs.

c. Critical jobs come within one or more of the following categories:

(1) Law enforcement.

(2) Positions involving the national security or the internal security of the Department of Defense in which drug abuse could cause disruption of operations, destruction of property, threats to the safety of personnel,

or the potential for unwarranted disclosure of classified information.

(3) Jobs involving protection of property or persons from harm.

2. *Guidelines for Use of Urinalysis*

a. Employees in or applicants for positions that have been designated in paragraph F.1.a., above, as critical jobs may be required to participate in urinalysis testing in the following circumstances:

(1) Before appointment or selection.

(2) Periodically after appointment or selection on the basis of neutral criteria.

(3) When there is probable cause to believe that an employee is under the influence of a controlled substance while on duty.

(4) In an examination authorized by the Department of Defense or the DoD Component regarding a mishap or safety investigation undertaken for the purpose of accident analysis and the development of countermeasures.

b. When a DoD Component establishes a urinalysis testing program, it shall inform, in writing, each employee in a critical job before the initial urinalysis test, of:

(1) The reasons for the urinalysis test.

(2) The consequences of a positive result or refusal to cooperate, including adverse action.

(3) The opportunity to submit supplemental medical documentation that may support a legitimate use for a specific drug.

(4) The availability of drug abuse counseling and referral services, including the name and phone number of the local employee assistance program counselor.

c. The information in paragraph F.2.b.(1), (2), (3), above, shall be given to each applicant who is required to undergo urinalysis testing. The information in paragraph F.2.b., above, shall be given to each employee who enters a critical job that is subject to urinalysis testing after the program is established.

d. An employee whose urinalysis has been confirmed as positive shall be offered counseling or treatment, or both, through the local employee assistance program in accordance with the Federal Personnel Manual Supplement (reference (c)), if qualified. Nothing in this provision precludes the use of a confirmed positive urinalysis result in an authorized adverse action proceeding or for other appropriate purposes, except as otherwise limited by rules issued by the DoD Component concerned.

e. The results of field tests may not be used in administrative or disciplinary proceedings except as permitted in subsection F.4, below.

3. *Urinalysis Testing Procedures*

a. Urine samples shall be processed under chain of custody procedures set forth in the DoD Component's implementing document. The ASD(HA) shall ensure that such procedures apply the principles set forth in enclosure 2 of DoD Directive 1010.1 (reference (a.), so far as the ASD(HA) deems practicable.

b. Urine samples shall be tested at a laboratory certified under enclosure 4 of reference (a), using procedures set forth in enclosure 3 of reference (a). The DoD Component's implementing document shall contain:

(1) Procedures for timely submission of requests for retention of records and specimens under sections H. and I., enclosure 3, of reference (a).

(2) Procedures for retesting. The ASD(HA) shall ensure that such procedures apply the principles set forth in section J., enclosure 3, of reference (a), so far as the ASD(HA) deems practicable.

4. *Field Testing of Urine Samples*

a. Field tests of urine samples may be conducted only if approved by the ASD(HA) for the DoD Component concerned under the principles in enclosure 5 of reference (a).

b. All urine specimens identified as positive by a field test shall be sent immediately to a laboratory certified under enclosure 4 of reference (a) for testing under enclosure 3 of reference (a).

(1) Positive test results from field tests are preliminary results until confirmed as positive (by both

initial and confirmatory testing) or by an admission of the employee.

(2) Before receipt of the report of tests results under enclosure 3 of reference (a) or an admission by the employee, positive results of field tests may be used for temporary referral to a civilian employee assistance program, temporary detail to other duties or administrative leave, or temporary suspension of access to classified information.

c. If a positive field test result is not reported as positive by a certified laboratory or an admission of an employee:

(1) The result may not be used to take further action against the employee.

(2) Any temporary action based upon the field test shall be rescinded.

d. To the extent that an action is based upon evidence other than the field test result, nothing in this Directive prohibits continuation of a temporary action or other appropriate action.

G. *EFFECTIVE DATE AND IMPLEMENTATION*

1. This Directive is effective immediately for the purpose of preparing implementing documents. The ASD(HA) memorandum of November 25, 1983 (reference (d)) is canceled, effective June 1, 1985. This Directive applies to drug abuse testing of DoD civilian employees conducted on or after June 1, 1985, except that a DoD Component, with the approval of the ASD(HA), may implement this Directive before June 1, 1985.

2. Nothing in this Directive shall be construed to render invalid any test conducted before June 1, 1985, under a DoD Component's drug abuse testing program.

3. DoD Components that propose to conduct civilian employee drug abuse testing on or after June 1, 1985, shall forward two copies of proposed implementing documents to the Assistant Secretary of Defense (Health Affairs) at least 45 days before the date on which the Component plans to initiate such a program. Implementing documents are not required from other DoD Components.

/s/ WILLIAM H. TAFT, IV
WILLIAM H. TAFT, IV
Deputy Secretary of Defense

APPENDIX H

Army Regulation 600-85

Alcohol and Drug Abuse Prevention and Control Program.

3 November 1986

5-14. Civilian Drug Abuse Testing Program

a. The Department of the Army has established a drug abuse testing program for civilian employees in critical jobs (as defined below). The program has the following objectives:

(1) To assist in determining fitness for, appointment to, or retention in a critical job.

(2) To identify drug abusers and notify them of the availability of appropriate counseling, referral, rehabilitation services, or other medical treatment.

(3) To assist in maintaining national security and the internal security of the Army by identifying those whose drug abuse could cause disruption in operations, destruction of property, threats to safety for themselves or others, or the potential for unwarranted disclosure of classified information through drug-related blackmail.

b. Certain jobs or classes of jobs, are important enough to the mission or to protection of public safety that screening to detect the presence of drugs is warranted as a job-related requirement, have been designated by DA as "critical" for the purpose of drug abuse testing. A complete listing of jobs including occupational series,

when possible, is found at table 5-1. These jobs fall into one or more of the following categories:

(1) Law enforcement.

(2) Positions involving national security or the internal security of the Army at a level of responsibility in which drug abuse could cause disruption of operations or the disclosure of classified information that could result in serious impairment of national defense.

(3) Jobs involving the protection of property or persons from harm, or those where drug abuse could lead to serious threats to safety of personnel.

Table 5-1
Classes of jobs to be included in the Army Civilian Employee Drug Abuse Testing Program

Aviation positions, inlcuding but not limited to
Job/job class: Air Traffic Controller Occupational series: 2152
Job/job class: Pilot Occupational Series: 2181
Job/job class: Aircraft Engine Mechanic Occupational series: 8602
Job/job class: Aircraft Overhaul Specialist Occupational series: 8801

Job/job class: Prop and Motor Mechanic
Occupational series: 8807

Job/job class: Aircraft Mechanic
Occupational series: 8853

Job/job class: Aircraft Servicer
Occupational series: 8862

Guard and Police Positions

Job/job class: Guard
Occupational series: 085

Job/job class: Police
Occupational series: 083

Job/job class: Criminal Investigator
Occupational series: 1181

Job/job class: Correctional Officer
Occupational series: 06/07

Personnel in Personal Reliability Program

Job/job class: Chemical and nuclear surety positions
Occupational series: None

Alcohol and Drug Abuse Prevention
and Control Program

Job/job class: Direct service staff
Occupational series: None

Job/job class: All employees at Army forensic drug testing laboratories
Occupational series: None

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c. The following applies to all employees covered by this testing program.

(1) Civilians employed in jobs identified as critical will be screened under the Civilian Drug Testing Program. This requirement is considered a condition of employment and applies to–

(a) Prospective employees being considered for critical jobs.

(b) Current employees being considered for critical jobs.

(2) Individuals being considered for or currently in jobs covered by this program must sign the DA Form 5019-R (Condition of Employment for Certain Civilian Positions Identified as Critical Under the Drug Abuse Testing Program). Completion of the form acknowledges the Department of the Army's right to require the applicant or employee to participate in urinalysis testing. DA Form 5019-R is located at the back of the regulation. The form will be reproduced locally on 8½- by 11-inch paper.

(3) In the event of a confirmed positive urinalysis test result or refusal to submit a specimen,–

(a) Prospective employees will be denied further consideration for appointment to the critical job.

(b) Current employees may be subject to adverse action proceedings under FPM chapter 752, FPM Supplement 752-1, and AR 690-700, chapter 751. Current employees in critical jobs will be either reassigned or demoted to a noncritical job; or, if there is no job available for which the employee is qualified, separated from the service. If eligible, they may be offered counseling and treatment as described in *e*(4) below.

(4) Current employees who previously were not covered by and refuse to enter the Drug Abuse Testing Program by signing the Condition of Employment form or who sign the form but refuse testing may be–

(a) Voluntarily or involuntarily reassigned or demoted to noncritical jobs at the activity or in the command.

(b) Removed from Federal service.

(5) Any attempt to substitute another person's urine for one's own, adulterate a sample given, or fraudulently affect reported results will result in action consistent with those outlined above and other applicable action consistent with those outlined above and other applicable actions outlined in AR 690-700, chapter 751.

d. There may be certain jobs which a local commander considers as critical for the purpose of drug abuse testing, but which do not fall within those listed in table 5-1. These may be included in the testing program

with prior approval of MACOM, DA, and DOD. A formal request for authorization to test these specific, local jobs must be forwarded through channels and must satisfy the requirements listed below. Decisions will be made on a case-by-case basis. Under no circumstances does an earlier decision to identify a specific job as critical carry over to any other job or job class, or to a similar job in any other location or situation.

(1) Any request for identification of a specific job as critical for the purpose of drug abuse testing must clearly fall within the parameters of paragraph 5-14*b*. The request for inclusion must specify that the primary duties of the job meet the criteria of one of the three categories described in paragraphs 5-14*b*(1), (2), or (3).

(2) The rationale for testing must be clearly stated and must be completely justified. The justification must indicate why the job is critical and specify negative results if an incumbent in that job abused drugs.

(3) A copy of the job description must be provided, with a schematic of the chain of supervision attached. The job description must be current and properly executed. If more than one individual is to be included in testing, the total number of employees covered will be provided. If the positions are being established or a change in the number of employees is expected, it must be so stated. Under no circumstances should the inclusion of a small number of employees be requested when rapid growth in that job class is forecast. If turnover is a problem, turnover rates should be specified.

(4) The location where the sample will be taken (work site, CPO, CCS) must be specified and a statement

from the local installation biochemical test coordinator concerning field test capability must be attached. The Drug Testing Laboratory that would normally test the sample must also be specified.

(5) Any request for designation of jobs as critical must be submitted through the respective MACOM for HQDA and DOD approval before testing is authorized. Request should be sent to the HQDA (DAPE-CP), WASH DC 20310-0300.

e. The guidelines below for the use of drug abuse testing for civilian employees will be followed in all cases.

(1) Employees working in or tentatively selected for positions designated as critical jobs may be required to participate in urinalysis testing in the following circumstances:

(a) Before appointment or selection. (All prospective employees will be tested prior to accession.)

(b) Periodically after appointment or selection on a random basis.

(c) When there is probable cause to believe that an employee is under the influence of a controlled substance while on duty.

(d) As part of examination authorized by DOD or DA regarding a mishap or safety investigation undertaken for the purpose of accident analysis and the development of countermeasures.

(2) At least 90 days before the initial urinalysis test, each employee in a critical job must be informed, in writing, of the following:

(a) The reasons for the urinalysis test.

(b) The consequences of a positive result or refusal to cooperate, including adverse action.

(c) That there will be an opportunity for them to submit supplemental medical documentation to support the legitimate use of a specific drug.

(d) That there are drug counseling and referral services available. This will include the name and phone number of the local employee assistance program counselor.

(e) The requirement for execution of DA Form 5019-R.

(3) The same information except for *e*(2)*(d)* above will be given, in writing, to each *applicant* tentatively selected for a critical job.

(4) An employee whose urinalysis has been confirmed as positive shall, if eligible, be offered counseling or treatment through the local employee assistance program in accord with FPM 792-2. This may be done in conjunction with other actions outlined in *c*(3) above. Nothing in this provision precludes the use of a confirmed positive urinalysis result in an authorized adverse action proceeding or for other appropriate purposes, except as otherwise limited by rules issued by the Department of the Army.

(5) The results of field testing may not be used in administrative or disciplinary proceedings except as permitted in *f*(5) below.

(f) Following are the general procedures for urinalysis testing. Should questions or procedures arise, they should be directed to the installation ADCO or the installation biochemical test coordinator (IBTC).

(1) Urine samples shall be processed under the strict chain of custody procedures as set forth in appendix E. These requirements will be followed with the word or title substitutions listed below. Any questions concerning terminology should be directed to the civilian personnel office and/or the ADAPCP.

(a) Unit commander means Installation commander, senior supervisor, or designee.

(b) UADC, see paragraph 10-4*e*(1) GS-7 or higher or the equivalent.

(c) Observer, paragraph 10-4*e*(2).

(d) Service member and soldier mean employee.

(e) Section leader means supervisor or designee.

(2) Urine samples shall be tested only at a laboratory certified under enclosure 4 of DOD Directive 1010.1 only using procedures set forth in enclosure 3 of that Directive.

(3) In the event that a sample tested and confirmed as positive must be retained beyond the time frame specified in paragraph 10-4*e*; the requirements found there must be followed.

(4) In the event that a retest is required, the requirements found in DOD Directive 1010.9 will be followed.

(5) Field testing may be conducted, but strict adherence to the following guidelines is required:

(a) All positive results from field tests of current employees are preliminary results until confirmed as positive by both initial and confirmatory testing or by an admission by the employee.

(b) Before the receipt of final test results or admission by the employee, positive results of field tests of current employee may only be used for temporary referral to a civilian employee assistance program, temporary detail to other noncritical duties or administrative leave, or temporary suspension of access to classified information.

(c) Observer, paragraph 10-4*e*(2).

(d) If a positive field test result of a current employee is not confirmed as positive by a certified laboratory or by admission of the employee, the result may not be used to take further action against the employee and any temporary action must be rescinded.

(d) If an applicant is not a current Federal employee, and does not have re-employment rights, an admission of drug use may be used as a valid reason for nonselection for a critical job. If an accession sample of an applicant is found to be positive by a certified field test and the applicant does not admit drug use, the sample must be forwarded for confirmation. The hiring action for applicants in this circumstance will be held in abeyance until the confirmatory testing is complete. If the final result is negative, the hiring action can be completed. However if the final result confirms the field test positive,

the applicant will not be assigned to any critical job. This does not preclude that individual from being considered for a critical job at a later date.

(6) The guidelines covering biochemical testing for illegal drugs, clearly delineate the responsibilities of unit commanders in the conduct of testing (para 10-4*e*). With the simple substitution of the term "supervisor" for "unit commander," all these guidelines apply to civilians. Any questions concerning testing procedures should be directed to the ADCO or IBTC. Questions that concern management responsibilities, disciplinary actions, and other related areas should be directed to the Civilian Personnel Office.

(7) The decision to require an individual covered by the biochemical testing program to undergo such testing to detect drug abuse is the commander's prerogative. The management of available quotas, both for field and laboratory tests, is the commander's responsibility. He or she must decide which segments of the total population, civilian and military, are more at risk and allocate quotas accordingly. Beyond the pre-accession test for civilian employees applying for critical positions, subsequent testing is left to the commander's discretion.

g. Drug testing civilian employees is not negotiable with recognized labor organizations because it involves the Army's internal security practices within the meaning of 5 USC. 7106(a)(1). Questions regarding labor relations implications of the civilian drug abuse testing program should be addressed through command channels to HQDA (DAPE-CPL).

APPENDIX I

DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
WASHINGTON, DC 20310

MEMORANDUM FOR ASSISTANT SECRETARY OF DEFENSE (HEALTH AFFAIRS)

SUBJECT: Request for Designation of Jobs/Classes of Jobs as "Critical" – ACTION MEMORANDUM

The Department of the Army is dedicated to reducing, to the greatest extent possible, the negative impact of illegal drug use on the performance of the Army mission. History has proven that for our military personnel one of the commander's most valuable tools in the attack on such drug use is the biochemical testing program. We believe that biochemical testing will also help to curb drug use among civilian employees. The value of this program, for both identification and deterrence, cannot be overrated.

On 8 April 1985, DOD Directive 1010.9 was published. It established policies and procedures for the implementation of drug abuse testing programs for DOD civilian employees. ODOSPER surveyed major Army commands, and identified the specific jobs and classes of jobs that should be included in the Army program; however, there are certain specific jobs that may be critical on a local level, but do not fall within the broader categories of those listed in Enclosure 1. We intend to provide a procedure for including in testing those jobs that might be identified by a commander as critical but are not critical on a service-wide basis. Submissions will be screened on a case-by-case basis by a DA level review board prior to being forwarded to DOD for consideration.

The enclosed list of jobs and classes of jobs, which the Army plans to include in its civilian urinalysis testing program is submitted for approval in accordance with instructions in DOD Directive 1010.9 (Encl 1).

The implementing document (in the form of an interim change to AR 600-85, 1 January 1982, Alcohol and Drug Abuse Prevention and Control Program) is found at enclosure 2.

William D. Clark
Principal Deputy Assistant
Secretary
(Manpower and Reserve Affairs)

JOBS/CLASSES OF JOBS TO BE INCLUDED
IN ARMY CIVILIAN URINALYSIS TESTING PROGRAM

Class of job: Civilian treatment staff of the Alcohol and Drug Abuse Prevention and Control Program (ADAPCP) whose duties involve direct contact with clients, civilian employees of the Army's Drug Testing Laboratories (DTL), and all employees involved in the chain of custody process for biochemical testing.

Justification: Testing of these jobs is critical to the continued credibility of the ADAPCP and the Army's biochemical testing program. While the job classes do not fall within the basic guidelines of DOD 1010.9, if the ADAPCP and DTL's are to function properly in assisting with identification and treatment of other military and civilian personnel, they must be certifiably drug free.

Number of employees: Approximately 650 worldwide.

APPENDIX J

Executive Order 12564 of September 15, 1986

Drug-Free Federal Workplace

I, RONALD REAGAN, President of the United States of America, find that:

Drug use is having serious adverse effects upon a significant proportion of the national work force and results in billions of dollars of lost productivity each year;

The Federal government, as an employer, is concerned with the well-being of its employees, the successful accomplishment of agency missions, and the need to maintain employee productivity;

The Federal government, as the largest employer in the Nation, can and should show the way towards achieving drug-free workplaces through a program designed to offer drug users a helping hand and, at the same time, demonstrating to drug users and potential drug users that drugs will not be tolerated in the Federal workplace;

The profits from illegal drugs provide the single greatest source of income for organized crime, fuel violent street crime, and otherwise contribute to the breakdown of our society;

The use of illegal drugs, on or off duty, by Federal employees is inconsistent not only with the law-abiding behavior expected of all citizens, but also with the special trust placed in such employees as servants of the public;

Federal employees who use illegal drugs, on or off duty, tend to be less productive, less reliable, and prone to greater absenteeism than their fellow employees who do not use illegal drugs;

The use of illegal drugs, on or off duty, by Federal employees impairs the efficiency of Federal departments and agencies, undermines public confidence in them, and makes it more difficult for other employees who do not use illegal drugs to perform their jobs effectively. The use of illegal drugs, on or off duty, by Federal employees also can pose a serious health and safety threat to members of the public and to other Federal employees;

The use of illegal drugs, on or off duty, by Federal employees in certain positions evidences less than the complete reliability, stability, and good judgment that is consistent with access to sensitive information and creates the possibility of coercion, influence, and irresponsible action under pressure that may pose a serious risk to national security, the public safety, and the effective enforcement of the law; and

Federal employees who use illegal drugs must themselves be primarily responsible for changing their behavior and, if necessary, begin the process of rehabilitating themselves.

By the authority vested in me as President by the Constitution and laws of the United States of America, including section 3301(2) of Title 5 of the United States Code, section 7301 of Title 5, of the United States Code, section 290ee-1 of Title 42 of the United States Code, deeming

such action in the best interests of national security, public health and safety, law enforcement and the efficiency of the Federal service, and in order to establish standards and procedures to ensure fairness in achieving a drug-free Federal workplace and to protect the privacy of Federal employees, it is hereby ordered as follows:

Section 1. *Drug-Free Workplace.*

(a) Federal employees are required to refrain from the use of illegal drugs.

(b) The use of illegal drugs by Federal employees, whether on duty or off duty, is contrary to the efficiency of the service.

(c) Persons who use illegal drugs are not suitable for Federal employment.

Sec. 2. *Agency Responsibilities.*

(a) The head of each Executive agency shall develop a plan for achieving the objective of a drug-free workplace with due consideration of the rights of the government, the employee, and the general public.

(b) Each agency plan shall include:

(1) A statement of policy setting forth the agency's expectations regarding drug use and the action to be anticipated in response to identified drug use;

(2) Employee Assistance Programs emphasizing high level direction, education, counseling, referral to rehabilitation, and coordination with available community resources;

(3) Supervisory training to assist in identifying and addressing illegal drug use by agency employees;

(4) Provision for self-referrals as well as supervisory referrals to treatment with maximum respect for individual confidentiality consistent with safety and security issues; and

(5) Provision for identifying illegal drug users, including testing on a controlled and carefully monitored basis in accordance with this Order.

Sec. 3. *Drug Testing Programs.*

(a) The head of each Executive agency shall establish a program to test for the use of illegal drugs by employees in sensitive positions. The extent to which such employees are tested and the criteria for such testing shall be determined by the head of each agency, based upon the nature of the agency's mission and its employees' duties, the efficient use of agency resources, and the danger to the public health and safety or national security that could result from the failure of an employee adequately to discharge his or her position.

(b) The head of each Executive agency shall establish a program for voluntary employee drug testing.

(c) In addition to the testing authorized in subsections (a) and (b) of this section, the head of each Executive agency is authorized to test an employee for illegal drug use under the following circumstances:

(1) When there is a reasonable suspicion that any employee uses illegal drugs;

(2) In an examination authorized by the agency regarding an accident or unsafe practice; or

(3) As part of or as a follow-up to counseling or rehabilitation for illegal drug use through an Employee Assistance Program.

(d) The head of each Executive agency is authorized to test any applicant for illegal drug use.

Sec. 4. *Drug Testing Procedures.*

(a) Sixty days prior to the implementation of a drug testing program pursuant to this Order, agencies shall notify employees that testing for use of illegal drugs is to be conducted and that they may seek counseling and rehabilitation and inform them of the procedures for obtaining such assistance through the agency's Employee Assistance Program. Agency drug testing programs already ongoing are exempted from the 60-day notice requirement. Agencies may take action under section 3(c) of this Order without reference to the 60-day notice period.

(b) Before conducting a drug test, the agency shall inform the employee to be tested of the opportunity to submit medical documentation that may support a legitimate use for a specific drug.

(c) Drug testing programs shall contain procedures for timely submission of requests for retention of records and specimens; procedures for retesting; and procedures, consistent with applicable law, to protect the confidentiality of test results and related medical and rehabilitation records. Procedures for providing urine specimens must allow individual privacy, unless the agency has reason to believe that a particular individual may alter or substitute the specimen to be provided.

(d) The Secretary of Health and Human Services is authorized to promulgate scientific and technical guidelines for drug testing programs, and agencies shall conduct their drug testing programs in accordance with these guidelines once promulgated.

Sec. 5. *Personnel Actions*

(a) Agencies shall, in addition to any appropriate personnel actions, refer any employee who is found to use illegal drugs to an Employee Assistance Program for assessment, counseling, and referral for treatment or rehabilitation as appropriate.

(b) Agencies shall initiate action to discipline any employee who is found to use illegal drugs, *provided that* such action is not required for an employee who:

(1) Voluntarily identifies himself as a user of illegal drugs or who volunteers for drug testing pursuant to section 3(b) of this Order, prior to being identified through other means;

(2) Obtains counseling or rehabilitation through an Employee Assistance Program; and

(3) Thereafter refrains from using illegal drugs.

(c) Agencies shall not allow any employee to remain on duty in a sensitive position who is found to use illegal drugs, prior to successful completion of rehabilitation through an Employee Assistance Program. However, as part of a rehabilitation or counseling program, the head of an Executive agency may, in his or her discretion, allow an employee to return to duty in a sensitive position if it is determined that this action would not pose a danger to public health or safety or the national security.

(d) Agencies shall initiate action to remove from the service any employee who is found to use illegal drugs and:

(1) Refuses to obtain counseling or rehabilitation through an Employee Assistance Program; or

(2) Does not thereafter refrain from using illegal drugs.

(e) The results of a drug test and information developed by the agency in the course of the drug testing of the employee may be considered in processing any adverse action against the employee or for other administrative

purposes. Preliminary test results may not be used in an administrative proceeding unless they are confirmed by a second analysis of the same sample or unless the employee confirms the accuracy of the initial test by admitting the use of illegal drugs.

(f) The determination of an agency that an employee uses illegal drugs can be made on the basis of any appropriate evidence, including direct observation, a criminal conviction, administrative inquiry, or the results of an authorized testing program. Positive drug test results may be rebutted by other evidence that an employee has not used illegal drugs.

(g) Any action to discipline an employee who is using illegal drugs (including removal from the service, if appropriate) shall be taken in compliance with otherwise applicable procedures, including the Civil Service Reform Act.

(h) Drug testing shall not be conducted pursuant to this Order for the purpose of gathering evidence for use in criminal proceedings. Agencies are not required to report to the Attorney General for investigation or prosecution any information, allegation, or evidence relating to violations of Title 21 of the United States Code received as a result of the operation of drug testing programs established pursuant to this Order.

Sec. 6. *Coordination of Agency Programs*

(a) The Director of the Office of Personnel Management shall:

(1) Issue government-wide guidance to agencies on the implementation of the terms of this Order;

(2) Ensure that appropriate coverage for drug abuse is maintained for employees and their families under the Federal Employees Health Benefits Program;

(3) Develop a model Employee Assistance Program for Federal agencies and assist the agencies in putting programs in place;

(4) In consultation with the Secretary of Health and Human Services, develop and improve training programs for Federal supervisors and managers on illegal drug use; and

(5) In cooperation with the Secretary of Health and Human Services and heads of Executive agencies, mount an intensive drug awareness campaign throughout the Federal work force.

(b) The Attorney General shall render legal advice regarding the implementation of this Order and shall be consulted with regard to all guidelines, regulations, and policies proposed to be adopted pursuant to this Order.

(c) Nothing in this Order shall be deemed to limit the authorities of the Director of Central Intelligence under the National Security Act of 1947, as amended, or the statutory authorities of the National Security Agency or the Defense Intelligence Agency. Implementation of this Order within the Intelligence Community, as defined in

Executive Order No. 12333, shall be subject to the approval of the head of the affected agency.

Sec. 7. *Definitions.*

(a) This Order applies to all agencies of the Executive Branch.

(b) For purposes of this Order, the term "agency" means an Executive agency, as defined in 5 U.S.C. 105; the Uniformed Services, as defined in 5 U.S.C. 2101(3) (but excluding the armed forces as defined by 5 U.S.C. 2101(2)); or any other employing unit or authority of the Federal government, except the United States Postal Service, the Postal Rate Commission, and employing units or authorities in the Judicial and Legislative Branches.

(c) For purposes of this Order, the term "illegal drugs" means a controlled substance included in Schedule I or II, as defined by section 802(6) of Title 21 of the United States Code, the possession of which is unlawful under chapter 13 of that Title. The term "illegal drugs" does not mean the use of a controlled substance pursuant to a valid prescription or other uses authorized by law.

(d) For purposes of this Order, the term "employee in a sensitive position" refers to:

(1) An employee in a position that an agency head designates Special Sensitive, Critical-Sensitive, or Noncritical-Sensitive under Chapter 731 of the Federal Personnel Manual or an employee in a position that an agency head designates as sensitive in accordance with Executive Order No. 10450, as amended;

(2) An employee who has been granted access to classified information or may be granted access to classified information pursuant to a determination of trustworthiness by an agency head under Section 4 of Executive Order No. 12356;

(3) Individuals serving under Presidential appointments;

(4) Law enforcement officers as defined in 5 U.S.C. 8331(20); and

(5) Other positions that the agency head determines involve law enforcement, national security, the protection of life and property, public health or safety, or other functions requiring a high degree of trust and confidence.

(e) For purposes of this Order, the term "employee" means all persons appointed in the Civil Service as described in 5 U.S.C. 2105 (but excluding persons appointed in the armed services as defined in 5 U.S.C. 2102(2)).

(f) For purposes of this Order, the term "Employee Assistance Program" means agency-based counseling programs that offer assessment, short-term counseling, and referral services to employees for a wide range of drug, alcohol, and mental health programs that affect employee job performance. Employee Assistance Programs are responsible for referring drug-using employees for rehabilitation and for monitoring employees' progress while in treatment.

Sec. 8. *Effective Date.* This Order is effective immediately.

/s/ Ronald Reagan

THE WHITE HOUSE,
September 15, 1986.

APPENDIX K

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Mandatory Guidelines for Federal Workplace Drug Testing Programs

SUMMARY: The Department of Health and Human Services (DHHS) adopts scientific and technical guidelines for Federal drug testing programs and establishes standards for certification of laboratories engaged in urine drug testing for Federal agencies.

EFFECTIVE DATE: April 11, 1988.

* * *

2.2 *Specimen Collection Procedures.*

(a) Designation of Collection Site. Each agency drug testing program shall have one or more designated collection sites which have all necessary personnel, materials, equipment, facilities, and supervision to provide for the collection, security, temporary storage, and shipping or transportation of urine specimens to a certified drug testing laboratory.

(b) Security. Procedures shall provide for the designated collection site to be secure. If a collection site facility is dedicated solely to urine collection, it shall be secure at all times. If a facility cannot be dedicated solely to drug testing, the portion of the facility used for testing shall be secured during drug testing.

(c) Chain of Custody. Chain of custody standardized forms shall be properly executed by authorized collection site personnel upon receipt of specimens. Handling and transportation of urine specimens from one authorized

individual or place to another shall always be accomplished through chain of custody procedures. Every effort shall be made to minimize the number of persons handling specimens.

(d) Access to Authorized Personnel Only. No unauthorized personnel shall be permitted in any part of the designated collection site when urine specimens are collected or stored.

(e) Privacy. Procedures for collecting urine specimens shall allow individual privacy unless there is reason to believe that a particular individual may alter or substitute the specimen to be provided.

(f) Integrity and Identity of Specimen. Agencies shall take precautions to ensure that a urine specimen not be adulterated or diluted during the collection procedure and that information on the urine bottle and in the record book can identify the individual from whom the specimen was collected. The following minimum precautions shall be taken to ensure that unadulterated specimens are obtained and correctly identified:

(1) To deter the dilution of specimens at the collection site, toilet bluing agents shall be placed in toilet tanks wherever possible, so the reservoir of water in the toilet bowl always remains blue. There shall be no other source of water (e.g., no shower or sink) in the enclosure where urination occurs.

(2) When an individual arrives at the collection site, the collection site person shall request the individual to present photo identification. If the individual does not

have proper photo identification, the collection site person shall contact the supervisor of the individual, the coordinator of the drug testing program, or any other agency official who can positively identify the individual. If the individual's identity cannot be established, the collection site person shall not proceed with the collection.

(3) If the individual fails to arrive at the assigned time, the collection site person shall contact the appropriate authority to obtain guidance on the action to be taken.

(4) The collection site person shall ask the individual to remove any unnecessary outer garments such as a coat or jacket that might conceal items or substances that could be used to tamper with or adulterate the individual's urine specimen. The collection site person shall ensure that all personal belonging such as a purse or briefcase remain with the outer garments. The individual may retain his or her wallet.

(5) The individual shall be instructed to wash and dry his or her hands prior to urination.

(6) After washing hands, the individual shall remain in the presence of the collection site person and shall not have access to any water fountain, faucet, soap dispenser, cleaning agent or any other materials which could be used to adulterate the specimen.

(7) The individual may provide his/her specimen in the privacy of a stall or otherwise partitioned area that allows for individual privacy.

(8) The collection site person shall note any unusual behavior or appearance in the permanent record book.

(9) In the exceptional event that an agency-designated collection site is not accessible and there is an immediate requirement for specimen collection (e.g., an accident investigation), a public rest room may be used according to the following procedures: A collection site person of the same gender as the individual shall accompany the individual into the public rest room which shall be made secure during the collection procedure. If possible, a toilet bluing agent shall be placed in the bowl and any accessible toilet tank. The collection site person shall remain in the rest room, but outside the stall, until the specimen is collected. If no bluing agent is available to deter specimen dilution, the collection site person shall instruct the individual not to flush the toilet until the specimen is delivered to the collection site person. After the collection site person has possession of the specimen, the individual will be instructed to flush the toilet and to participate with the collection site person in completing the chain of custody procedures.

(10) Upon receiving the specimen from the individual, the collection site person shall determine that it contains at least 60 milliliters of urine. If there is less than 60 milliliters of urine in the container, additional urine shall be collected in a separate container to reach a total of 60 milliliters. (The temperature of the partial specimen in each separate container shall be measured in accordance with paragraph (f)(12) of this section, and the partial specimens shall be combined in one container.) The individual may be given a reasonable amount of liquid to drink for this purpose (e.g., a glass of water). If the individual fails for any reason to provide 60 milliliters of

urine, the collection site person shall contact the appropriate authority to obtain guidance on the action to be taken.

(11) After the specimen has been provided and submitted to the collection site person, the individual shall be allowed to wash his or her hands.

(12) Immediately after the specimen is collected, the collection site person shall measure the temperature of the specimen. The temperature measuring device used must accurately reflect the temperature of the specimen and not contaminate the specimen. The time from urination to temperature measurement is critical and in no case shall exceed 4 minutes.

(13) If the temperature of a specimen is outside the range of 32.5°-37.7°C/90.5°-99.8°F, that is a reason to believe that the individual may have altered or substituted the specimen, and another specimen shall be collected under direct observation of a same gender collection site person and both specimens shall be forwarded to the laboratory for testing. An individual may volunteer to have his or her oral temperature taken to provide evidence to counter the reason to believe the individual may have altered or substituted the specimen caused by the specimen's temperature falling outside the prescribed range.

(14) Immediately after the specimen is collected, the collection site person shall also inspect the specimen to determine its color and look for any signs of contaminants. Any unusual findings shall be noted in the permanent record book.

(15) All specimens suspected of being adulterated shall be forwarded to the laboratory for testing.

(16) Whenever there is reason to believe that a particular individual may alter or substitute the specimen to be provided, a second specimen shall be obtained as soon as possible under the direct observation of a same gender collection site person.

(17) Both the individual being tested and the collection site person shall keep the specimen in view at all times prior to its being sealed and labeled. If the specimen is transferred to a second bottle, the collection site person shall request the individual to observe the transfer of the specimen and the placement of the tamperproof seal over the bottle cap and down the sides of the bottle.

(18) The collection site person and the individual shall be present at the same time during procedures outlined in paragraphs (f)(19)-(f)(22) of this section.

(19) The collection site person shall place securely on the bottle an identification label which contains the date, the individual's specimen number, and any other identifying information provided or required by the agency.

(20) The individual shall initial the identification label on the specimen bottle for the purpose of certifying that it is the specimen collected from him or her.

(21) The collection site person shall enter in the permanent record book all information identifying the specimen. The collection site person shall sign the permanent record book next to the identifying information.

(22) The individual shall be asked to read and sign a statement in the permanent record book certifying that the specimen identified as having been collected from him or her is in fact that specimen he or she provided.

(23) A higher level supervisor shall review and concur in advance with any decision by a collection site person to obtain a specimen under the direct observation of a same gender collection site person based on a reason to believe that the individual may alter or substitute the specimen to be provided.

(24) The collection site person shall complete the chain of custody form.

(25) The urine specimen and chain of custody form are now ready for shipment. If the specimen is not immediately prepared for shipment, it shall be appropriately safeguarded during temporary storage.

(26) While any part of the above chain of custody procedures is being performed, it is essential that the urine specimen and custody documents be under the control of the involved collection site person. If the involved collection site person leaves his or her work station momentarily, the specimen and custody form shall be taken with him or her or shall be secured. After the collection site person returns to the work station, the custody process will continue. If the collection site person is leaving for an extended period of time, the specimen shall be packaged for mailing before he or she leaves the site.

(g) Collection Control. To the maximum extent possible, collection site personnel shall keep the individual's

specimen bottle within sight both before and after the individual has urinated. After the specimen is collected, it shall be properly sealed and labeled. An approved chain of custody form shall be used for maintaining control and accountability of each specimen from the point of collection to final disposition of the specimen. The date and purpose shall be documented on an approved chain of custody form each time a specimen is handled or transferred and every individual in the chain shall be identified. Every effort shall be made to minimize the number of persons handling specimens.

(h) Transportation to Laboratory. Collection site personnel shall arrange to ship the collected specimens to the drug testing laboratory. The specimens shall be placed in containers designed to minimize the possibility of damage during shipment, for example, specimen boxes or padded mailers; and those containers shall be securely sealed to eliminate the possibility of undetected tampering. On the tape sealing the container, the collection site supervisor shall sign and enter the date specimens were sealed in the containers for shipment. The collection site personnel shall ensure that the chain of custody documentation is attached to each container sealed for shipment to the drug testing laboratory.

* * *

2.4 Laboratory Analysis Procedures.

* * *

(e) Initial Test. (1) The initial test shall use an immunoassay which meets the requirements of the Food and Drug Administration for commercial distribution. The

following initial cutoff levels shall be used when screening specimens to determine whether they are negative for these five drugs or classes of drugs:

	Initial test level (ng/ml)
Marijuana metabolites	100
Cocaine metabolites	300
Opiate metabolites	[1]300
Phencyclidine	25
Amphetamines	1,000

[1]25ng/ml if immunoassay specific for free morphine.

(2) These test levels are subject to change by the Department of Health and Human Services as advances in technology or other considerations warrant identification of these substances at other concentrations. Initial test methods and testing levels for other drugs shall be submitted in writing by the agency for the written approval of the Secretary.

(f) Confirmatory Test. (1) All specimens identified as positive on the initial test shall be confirmed using gas chromatography/mass spectrometry (GC/MS) techniques at the cutoff values listed in this paragraph for each drug. All confirmations shall be by quantitative analysis. Concentrations which exceed the linear region of the standard curve shall be documented in the laboratory record as "greater than highest standard curve value."

	Confirmatory test level (ng/ml)
Marijuana metabolite[1]	15
Cocaine metabolite[2]	150
Opiates:	
Morphine	*300
Codeine	*300
Phencyclidine	25
Amphetamines:	
Amphetamine	500
Methamphetamine	500

[1]Delta-9-tetrahydrocannabinol-9-carboxylic acid.
[2]Benzoylecgonine.

(2) These test levels are subject to change by the Department of Health and Human Services as advances in technology or other considerations warrant identification of these substances at other concentrations. Confirmatory test methods and testing levels for other drugs shall be submitted in writing by the agency for the written approval of the Secretary.

* * *

No. 89-635

In the Supreme Court of the United States

OCTOBER TERM, 1989

NATIONAL FEDERATION OF FEDERAL EMPLOYEES,
PETITIONER

v.

DICK CHENEY, SECRETARY OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

JOHN G. ROBERTS, JR.
Acting Solicitor General
STUART M. GERSON
Assistant Attorney General
LEONARD SCHAITMAN
ROBERT V. ZENER
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

16 pp

QUESTION PRESENTED

Whether the Fourth Amendment prohibits random drug testing of civilian employees of the Army who serve as drug counsellors in the Army's Alcohol and Drug Abuse Prevention and Control Program.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-29) is reported at 884 F.2d 603. The opinions of the district court (Pet. App. 35-50, 51-98) are reported at 680 F. Supp. 416 and 690 F. Supp. 46.

JURISDICTION

The judgment of the court of appeals was entered on August 29, 1989. The petition for a writ of certiorari was filed on October 19, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case involves three consolidated suits brought by federal employee unions, challenging the drug testing program adopted by the Department of the Army for its civilian employees. The program provides for random testing of civilian employees holding certain "critical jobs" constituting some 2% of the Army's 450,000 civilian positions. Pet. App. 4, 5. These employees fall into four categories: (1) employees who fly and service airplanes and helicopters, including air traffic controllers, pilots, mechanics and aircraft attendants; (2) employees occupying "[c]hemical and nuclear surety" positions, including nuclear reactor operators, nuclear weapons technicians, chemical ammunition maintenance specialists, quality assurance personnel, material handlers, laboratory workers, and others; (3) employees in law enforcement positions (mostly civilian police and guards); and (4) employees of the Army's Alcohol and Drug Abuse Prevention and Control Program (ADAPCP) (primarily drug counsellors and employees at the Army's drug testing laboratories). *Id.* at 16, 19, 21, 24.[1]

The district court held that the program violated the Fourth Amendment as to all four categories of jobs,

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[1] The program went into effect in 1986, before the President directed federal agencies to fashion drug testing programs for critical employees. Exec. Order No. 12,564, 51 Fed. Reg. 32,889 (Sept. 17, 1986). Following issuance of the Executive Order and the promulgation of drug testing guidelines by the Department of Health and Human Services, the Army amended its program to incorporate the HHS drug testing procedures. Those procedures were before this Court in *National Treasury Employees Union* v. *Von Raab*, 109 S.Ct. 1384, 1388-1389, 1394 n. 2 (1989).

and entered preliminary and final injunctions prohibiting implementation of the program. Pet. App. 35-50, 51-98.

2. The court of appeals reversed with respect to most of the employees included in the program. Pet. App. 1-29. In accordance with this Court's decisions in *National Treasury Employees Union* v. *Von Raab*, 109 S. Ct. 1384 (1989), and *Skinner* v. *Railway Labor Executives' Ass'n*, 109 S. Ct. 1402 (1989), the court of appeals focused on whether "the government's need to conduct the suspicionless searches outweigh[ed] the privacy interests of the covered employees in such a fashion that it [was] 'impractical to require a warrant or some level of individualized suspicion.'" Pet. App. 12. The court rejected petitioner's contention that *Von Raab* and *Skinner* were of "little or no impact" because the Army's program provides for testing on a random basis. *Ibid.*[2]

The court found that the balance of governmental and individual interests justified random drug testing of employees who fly and service airplanes and helicopters; the court explained that for these employees "[a] single drug related lapse * * * could have irreversible and calamitous consequences." Pet. App. 16. The court also approved the Army's program as applied to civilian police and guards, on the ground that these employees are armed (many with automatic weapons), and are often stationed at facilities housing nuclear reactors, toxic chemical agents, or large quantities of

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[2] On this point, the court relied on the D.C. Circuit's decision in *Harmon* v. *Thornburgh*, 878 F.2d 484 (1989), petition for cert. pending, No. 89-679. We are today filing our brief in opposition in No. 89-679.

munitions. *Id.* at 22. For employees in "[c]hemical and nuclear surety positions," the court of appeals remanded for further factual findings; it concluded that this category may have been drawn to include some employees who in fact do not have access to chemical or nuclear materials or to sensitive information. *Id.* at 19-21.

Finally, the court of appeals sustained random testing as to some employees of the ADAPCP program, and held it invalid as to others. The court upheld the program as to employees, principally drug counsellors, whose duties involve direct contact with clients of the program. The court found that the Army had a legitimate interest in assuring that its drug counsellors were not themselves drug users (Pet. App. 26):

> It is apparent that drug counsellors who themselves use illicit drugs, like drug-using interdiction agents, may "because of their own drug use, [be] unsympathetic to their mission." *See Von Raab*, 109 S. Ct. at 1393. This concern is all the more pressing because of a drug counsellor's full-time, largely unstructured contact with drug users. While the consequences of a drug counsellor's misplaced sympathies may not be as extreme as those attributable to drug use by drug interdiction personnel–risks to "our Nation's first line of defense" against the mass importation of illegal drugs and to the health and safety of the agents–the Army maintains a legitimate interest in ensuring that its employees are allegiant to their essential mission.

The court of appeals also concluded that drug counsellors have a diminished expectation of privacy with respect to drug testing because they "reasonably should expect heightened scrutiny into activities which

evidence such a basic infidelity to their mission." Pet. App. 26-27.[3]

Petitioners seek further review of the court's ruling with respect to drug counsellors in the ADAPCP program.

ARGUMENT

The court of appeals' holding that the Army may require random testing of its drug counsellors is faithful to the principles recognized by this Court in *Skinner* and *Von Raab*. Six circuits, including the court below, have rejected petitioner's principal contention, which is that the balancing analysis outlined in the Court's cases is inapplicable to *random* testing, and *Skinner* and *Von Raab* do not suggest otherwise. Further review is therefore not warranted.

1. Petitioner argues (Pet. 12) that there is a "crucial distinction" between programs providing for random drug testing and programs of the type at issue in *Skinner* and *Von Raab*. However, six circuits have now upheld programs proving for random drug testing against similar Fourth Amendment claims. *Guiney* v. *Roache*, 873 F.2d 1557 (1st Cir. 1989) (Boston police officers required to carry firearms), cert. denied, No. 89-205 (Nov. 13, 1989); *Transport Workers' Union, Local 234* v. *Southeastern Pennsylvania Transportation*

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[3] The court of appeals struck down the program to the extent that it provided for random testing of employees at the Army's drug testing laboratories. Observing that "a drug-related lapse by such an employee does not portend either direct or irreparable harm," the court found that "testing these employees lacks the necessary causal connection between the employees' duties and the feared harm." Pet. App. 27-28.

Authority, 884 F.2d 709 (3d Cir. 1989) (public transit employees); *Thomson* v. *Marsh*, 884 F.2d 113 (4th Cir. 1989) (Army civilian employees with access to chemical warfare material); *Taylor* v. *O'Grady*, No. 88-1783 (7th Cir. Nov. 1, 1989) (correctional officers in regular contact with prisoners); *Rushton* v. *Nebraska Public Power District*, 844 F.2d 562 (8th Cir. 1988) (nuclear power plant employees); *American Federation of Government Employees* v. *Skinner*, 885 F.2d 884 (D.C. Cir. 1989) (Department of Transportation employees with safety-sensitive jobs, including aircraft mechanics and safety inspectors); *Harmon* v. *Thornburgh*, 878 F.2d 484 (D.C. Cir. 1989) (Department of Justice lawyers with top secret security clearances), petition for cert. pending, No. 89-679.

Except for *Rushton*, which was cited with approval in *Skinner*, 109 S. Ct. at 1419, all of these decisions were issued after this Court's decisions in *Von Raab* and *Skinner*. Notwithstanding the fact that the programs at issue provided for *random* testing, the courts uniformly applied the balancing approach outlined by this Court last Term, which requires a court to weigh "the public interest in the * * * testing program against the privacy concerns implicated by the tests, * * * to assess whether the tests required * * * are reasonable." *Von Raab*, 109 S. Ct. at 1397. Thus, while some of the decisions have acknowledged that random testing is a factor that is relevant to the constitutionality of a program, the courts of appeals have rejected the contention that random testing calls for fundamentally different constitutional treatment. The statement of the District of Columbia Circuit in *Harmon* v. *Thornburgh*, 878 F.2d at 489, is representative:

> Certainly the random nature of the [agency] testing plan is a *relevant* consideration; and in a particularly close case, it is possible that this factor would tip the scales. We do not believe, however, that this aspect of the program requires us to undertake a fundamentally different analysis from that pursued by the Supreme Court in *Von Raab*.[4]

The uniform approach of the courts of appeals to random drug testing is entirely consistent with the reasoning of this Court's decisions. Contrary to petitioner's contention (Pet. 11), the Court's observation in *Skinner*, 109 S. Ct. at 1417, that a search may be reasonable without individualized suspicion "where the privacy interests implicated by the search are minimal" does not foreclose random testing. Random testing involves no greater physical restraint on the individuals tested than the program in *Skinner*. To the extent that the magnitude of the intrusion relates to the expectations engendered by the characteristics of an employee's job, see *id.* at 1418, nothing in this Court's decisions suggests that an employee has a fundamentally greater expectation in avoiding random testing tha·.

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[4] Random testing of incumbents holding sensitive positions is potentially more effective in deterring and detecting drug use than one-time testing of applicants for such positions. "While it is true that random testing may increase employee anxiety and the invasion of the subjective expectations of privacy, it also limits discretion in the selection process and presumably enhances drug-use deterrence." *American Federation of Government Employees* v. *Skinner*, 885 F.2d 884, 891 (D.C. Cir. 1989) (footnote omitted). This consideration may thus tend to tip the scales toward the governmental side of the balance mandated by this Court's cases.

the type of testing at issue in this Court's cases.[5] Thus, whether testing is random or not, this Court's decisions obligate a court to examine the particular characteristics of positions that are subject to testing to determine the extent of those employees' reasonable expectations of privacy. The court of appeals undertook that analysis in this case, and petitioner's disagreement with the court's valuation of the interests of the particular employees at issue does not warrant this Court's review.

The Court's decisions in traffic stop cases also provide no support for petitioner's position. See Pet. 12. The two decisive shortcomings in the discretionary license checks that were held unconstitutional in *Delaware* v. *Prouse*, 440 U.S. 648 (1979), are not present in the program at issue here. First, in *Delaware* v. *Prouse*, "every vehicle on the roads" was subject to seizure "at the unbridled discretion of law enforcement officials," and thus there was a "'grave danger' of abuse of discretion." *Id.* at 661, 662.[6] By contrast, the Army's testing program reserves *no* discretion to agency officials as to who will be tested.[7]

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[5] The Court's observation in a footnote in *Von Raab* that "applicants know at the outset that a drug test is a requirement of" the positions at issue there, mentioned as one of various factors that "minimize the intrusiveness of the Service's drug screening program," 109 S. Ct. at 1394 n.2, does not justify a fundamental distinction between random and universal testing programs.

[6] See also *Colorado* v. *Bertine*, 479 U.S. 367, 376-377 (1987) (Blackmun, J., concurring).

[7] The Army's program is subject to guidelines issued by the Office of Personnel Management that state that "[a]gencies are

Second, the discretionary license checks in *Delaware* v. *Prouse*, *supra*, entailed "signalling a moving automobile to pull over to the side of the roadway, by means of a possibly unsettling show of authority." 440 U.S. at 657. Here, the Army is required to provide advance notice of random testing,[8] thereby mitigating any tendency of the program to engender "concern or even

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absolutely prohibited from selecting positions for drug testing on the basis of a desire to test particular employees." Federal Personnel Manual Letter 792-19, 54 Fed. Reg. 47,324, 47,330 (1989). Once positions are designated for random testing, the OPM Guidelines suggest various methods of random selection: "their names or social security numbers may be selected randomly by computer, they may be selected according to their birth dates, or they may be selected by the first letter in their surnames." *Ibid.* Alternatively, the head of the agency may decide that all employees in the positions designated for testing shall be tested. *Ibid.*

Moreover, the procedures that must be followed in administering the drug tests are prescribed in detail by the HHS Guidelines–an additional protection against abuse or harassment. See Pet. App. 132-141.

[8] Executive Order No. 12,564 requires agencies, including the Army, to give their employees 60 days notice before a drug testing program is implemented. Pet. App. 124. In addition, employees who are subject to random testing must receive another notice, no less than 30 days before testing begins. Federal Personnel Manual Letter 792-19, Section 4.b., 54 Fed. Reg. 47,331 (Nov. 13, 1989).

To be sure, the particular time or date of the random test is kept a surprise, in order to deny employees who use drugs an opportunity to defeat the purpose of the tests by abstaining for a period of time. However, that degree of "surprise" is no different than that contemplated by the random checkpoint stops to which the Court alluded in *Delaware* v. *Prouse*, 440 U.S. at 663.

fright," *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 558 (1976), and employees are informed discretely that they are to be tested. This combination of advance publicity and discrete notification provides "visible evidence, reassuring to law-abiding" employees, that the random tests are "duly authorized and believed to serve the public interest." *United States* v. *Martinez-Fuerte*, 428 U.S. at 559.

Indeed, the Court took care in *Delaware* v. *Prouse*, 440 U.S. at 663, to emphasize that States would be allowed to design "methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion," and it held only that motorists could not "have their travel and privacy interfered with at the *unbridled discretion of police officers*" (emphasis added). See also *id.* at 663-664 (Blackmun, J., concurring) (noting that the result would have been quite different in a case involving "purely random stops (such as every 10th car to pass a given point)"). The Army's program is carefully designed to exclude "unbridled discretion" and thus is not suspect under *Delaware* v. *Prouse*, *supra*.

In short, nothing in this Court's cases suggests that a random testing program is so inherently intrusive that it constitutes a *per se* violation of the Fourth Amendment. Rather, as the court of appeals held, random programs should be analyzed within the framework established by this Court in *Skinner* and *Von Raab*.

2. Petitioner also maintains that the court of appeals "glossed over critical distinctions between front-line drug interdiction personnel and the Army's civilian treatment staff" and thereby "betray[ed] a fundamental misunderstanding of *Von Raab*." Pet. 13. In petitioner's view, the Army's interest in assuring that its drug

counsellors are not themselves users of drugs is not sufficiently compelling, judged by comparison to the justifications for drug programs at issue in this Court's cases last Term, to warrant testing without individualized suspicion. *Ibid.* The court of appeals, however, correctly rejected petitioner's narrow view of this Court's decisions.

Nothing in *Von Raab* suggests that the particular safety and security concerns involved in those cases are the only grounds that will justify drug testing. Moreover, as the court of appeals found, the Army has a strong interest in deterring and detecting drug use among its drug counsellors. Those counsellors occupy a critical place in the Army's comprehensive drug program, and drug use in their ranks is fundamentally incompatible with their function. Pet. App. 26-27. There is no doubt that a counsellor who uses drugs is at best unqualified to rehabilitate those who are attempting to control their addiction to drugs; at worst, such a counsellor may actually contribute to a patient's addiction. The risk that drug users will not provide effective treatment, although it may not immediately jeopardize public safety, threatens the lives and well-being of persons seeking help from the Army for their drug problems and subverts the essential purpose of the Army's drug treatment program. Even if *Von Raab* set a constitutional floor for the interests necessary for drug testing programs, the Army's interest in ensuring the effectiveness and integrity of its drug treatment efforts would easily meet that standard.

In short, the court of appeals faithfully applied the standards set forth by this Court last Term to the Army's drug counsellors. In our view, the court did not overvalue the Army's interest in the integrity of

those counsellors or undervalue their interests in confidentiality. But in any event, the court's assessment of those competing interests on the facts of this case does not raise an issue warranting this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

JOHN G. ROBERTS, JR.
Acting Solicitor General *
STUART M. GERSON
Assistant Attorney General
LEONARD SCHAITMAN
ROBERT V. ZENER
Attorneys

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* The Solicitor General is disqualified in this case.

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